TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 264 1902. 23

ANNIE ANDREWS, PLAINTIFF IN ERROR,

vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED JULY 28, 1902.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 364.

ANNIE ANDREWS, PLAINTIFF IN ERROR,

vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Kate H. Andrews, appellant, and Annie Andrews, appellee, in a petition for administration, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Annie Andrews, appellee, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth day of August next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the sixth day of July, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
OLIVER WENDELL HOLMES,
Chief Justice ~~Clerk for the~~ *Supreme Judicial Court.*

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court within and for the said county of Suffolk, have hereto set my hand and the seal of said court this nineteenth day of July, A. D. 1900.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, sitting at Boston, in said county of Suffolk, for the hearing of all causes, matters, and things cognizable by a supreme court of probate, between the first day of January, in the year nineteen hundred, and the thirty-first day of December, in the same year, both inclusive, it is thus contained, the following being the entire record in the case:

4 6084. Annie Andrews, of said Boston, administratrix of the estate of Charles S. Andrews, late of said Boston, deceased, appellee, against Kate H. Andrews, of Washington, in the District of Columbia, widow of said Charles S. Andrews, appellant from a decree of the judge of probate, at a probate court holden at said Boston, within and for said county of Suffolk, on the fourteenth day of October, A. D. 1897, upon the following petition, to wit:

5 *Petition.*

To the honorable the judge of the probate court in and for the county of Suffolk:

Respectfully represents Annie Andrews, of Boston, in said county, that Charles S. Andrews, who last dwelt in said Boston, died on the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-seven, intestate, possessed of goods and estate remaining to be administered, leaving as widow, his only heirs-at-law, and next of kin the persons whose names, residences, and relationship to the deceased are as follows, viz:

Name.	Residence.	Relationship.
Annie Andrews.....	Boston.....	Widow.
Charles H. Andrews.....	"	Son (minor).
Pauleta Andrews.....	"	Daughter (minor).

That your petitioner is his widow.

Wherefore your petitioner prays that she, or some other suitable person, be appointed administratrix of the estate of said deceased, and certifies that the statements herein contained are true to the best of her knowledge and belief.

Dated this 14th day of October, A. D. 1897.

ANNIE ANDREWS.

SUFFOLK, *ss:*

Subscribed and sworn to this 14th day of October, A. D. 1897.
Before me—

ELBRIDGE R. ANDERSON,
Justice of the Peace.

The undersigned, being all the persons interested residing in the Commonwealth who are of full age and legal capacity, hereby assent to the foregoing petition.

CHARLES H. ANDREWS.
PAULETA ANDREWS.
ANNIE ANDREWS,
Their Guardian.

6 Upon which petition it was ordered and decreed by said probate court as follows, to wit:

7 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Suffolk, }

At a probate court holden at Boston, in and for said county of Suffolk, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

The petition of Annie Andrews, of Boston, in said county, praying that she, or some other suitable person, be appointed administratrix of the estate of Charles S. Andrews, late of Boston, in said county of Suffolk, deceased, intestate, having been considered, and it appearing that the petitioner is the widow of said deceased, and that the next of kin are minors—

It is decreed that said petitioner be appointed administratrix of said estate, first giving bond, with sufficient sureties, for the due performance of said trust.

ROBERT GRANT,
Judge of Probate Court.

8 From which decree said appellant appealed to this court, being the supreme court of probate for said Commonwealth, in the words following, to wit:

9 To the honorable the judge of the probate court in and for the county of Suffolk:

Represents Kate H. Andrews, now of Washington, in the District of Columbia, that she is the widow of Charles S. Andrews, late of Boston, in the county of Suffolk, deceased, and is interested in the

estate of said deceased; that she is aggrieved by a decree of the probate court held at Boston, in said county of Suffolk, on the fourteenth day of October, A. D. 1897, whereby said court appointed Annie Andrews as the administratrix of the estate of said Charles S. Andrews.

And she hereby gives notice that she claim- an appeal from said decree to the supreme judicial court.

Dated this 4th day of November, A. D., 1897.

KATE H. ANDREWS,
By FRANK D. ALLEN,
Her Attorney.

Filed Nov. 5, 1897.

10 And said appellant entered her said appeal in the clerk's office of said court on the ninth day of November, A. D. 1897; and thereupon the appellant appeared by her attorneys, A. Hemenway and F. D. Allen, Esquires.

And the appellant filed in this court the following objections, to said decree, to wit:

11 SUFFOLK, ss:

Supreme Judicial Court.

KATE H. ANDREWS, Appellant,
vs.
ANNIE ANDREWS, Administratrix Estate of Charles S. Andrews.

Objection to Decree.

And now comes Kate H. Andrews, the appellant in the above-entitled cause, and says that she objects to the decree of the probate court made in said suit for the following reason:

Because the statement of the appellee, said Annie Andrews, in her petition to the probate court for administration of the estate of said Charles S. Andrews, that she is the widow of said Charles S. Andrews is not true, as the appellant at the time of the death of said Charles S. Andrews was his only lawful wife and is now his widow.

KATE H. ANDREWS,
By FRANK D. ALLEN,
Her Attorney.

Suffolk, ss: Supreme judicial court. Filed Nov. 9, 1897.

12 And on the fifteenth day of December, A. D. 1897, the appellee appeared by her attorneys, Bartlett and Anderson, Esquires.

And on the nineteenth day of January, A. D. 1899, the appellee filed an answer to the claim of appeal as follows, to wit:

13 SUFFOLK, *ss*:

Supreme Judicial Court.

ANDREWS
v.
ANDREWS.

Answer to Claim of Kate H. Andrews.

And now comes Annie Andrews, the petitioner, and denies that the said Kate is a person interested in the estate of said Charles S. Andrews, deceased, and denies that said Kate is the widow of said Charles S. Andrews, and says that she has no right in law to prosecute this appeal and this court has no jurisdiction to entertain, hear, or determine the same.

ANNIE ANDREWS,
By her att'ys, BARTLETT & ANDERSON.

14 Whereupon a hearing was had, and on the sixth day of February, A. D. 1899, the following decree was entered by the court, to wit: Decree of probate court reversed.

Whereupon the appellee, by her attorney, alleged sundry exceptions to the ruling and opinion of the court in certain matters of law, and the same, being reduced to writing and presented to the court and found conformable to the truth, were allowed and signed by the presiding justice as follows, to wit:

15 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Probate.

ANNIE ANDREWS, Administratrix,
v.
KATE H. ANDREWS, Appellant.

Appellee's Bill of Exceptions.

This was an appeal from the appointment of Annie Andrews as administratrix of the estate of Charles S. Andrews from the probate court for the county of Suffolk and Commonwealth aforesaid.

Annie Andrews filed her petition in the said probate court upon the 14th day of October, 1897, and in said petition set forth that she was the widow of the said Charles S. Andrews, and that there had been born to her and the said Charles S. Andrews two children, minors, whose names hereinafter appear. And the said appellee claimed the right to the appointment as such administratrix as such widow. On the 14th day of October aforesaid, the probate court, by its decree, appointed the said Annie Andrews as such administratrix. On the 5th day of November, 1897, the appellant, Kate H. Andrews, claimed an appeal from said probate court to the supreme judicial court, and filed objections to the said decree and entered her appeal in the said supreme judicial court. The objections to the decree filed by the appellant were as follows:—

"*Objections to Decree.*

Supreme Judicial Court, Suffolk, ss.

KATE H. ANDREWS, Appellant,
vs.
ANNIE ANDREWS, Administratrix Estate of Charles S. Andrews.

And now comes Kate H. Andrews, the appellant in the above-entitled cause, and says that she objects to the decree of the probate court made in said suit for the following reasons:—

16 Because the statement of the appellee, said Annie Andrews, in her petition to the probate court for the administration of the estate of said Charles S. Andrews that she is the widow of said Charles S. Andrews, is not true, as the appellant at the time of the death of said Charles S. Andrews was his only lawful wife and is now his widow.

KATE H. ANDREWS,
By FRANK D. ALLEN,
Her Attorney."

The said objections to decree were filed on November 9, 1897. To the objections to decree the appellee filed an answer, which was as follows:—

"*Answer to Claim of Kate H. Andrews.*

SUFFOLK, *ss:*

Supreme Judicial Court.

ANDREWS
v.
ANDREWS.

And now comes Annie Andrews, the petitioner, and denies that the said Kate is a person interested in the estate of said Charles S. Andrews, deceased, and denies that the said Kate is the widow of said Charles S. Andrews, and says that she has no right in law to prosecute this appeal, and this court has no jurisdiction to entertain, hear, or determine the same."

The answer was signed "Annie Andrews, by her attorneys, Bartlett & Anderson."

Thereafter the case came on, and was heard before a justice of this court; and all of the evidence material to the questions raised by this bill of exceptions is as follows:—

ELIZABETH M. ANDREWS, a witness called by the appellee, testified as follows:

"My full name is Elizabeth M. Andrews. I reside in Boston. I am a sister of Annie Andrews. In 1893 I was present at the marriage of my sister Annie to Charles S. Andrews. They were married in Boston by the Rev. Mr. Horton. The marriage took place

at my mother's home on Marlborough street. After they were married they went on a short wedding trip for two or three days, and then they returned because Mr. Andrews was ill, and lived in Boston. They took an apartment on Massachusetts avenue. After that they lived in various places here in Boston, and during the summers they spent with us at the house of Charles H. Andrews, Sr.; I was living with my father-in-law, Charles H. Andrews. My husband was Edward J. Andrews, a brother of Charles S. Andrews.

I was present in the house at the time of the birth of
17 the oldest child mentioned in this probate petition. It was October 17, 1893. The child was born in Boston. That child's name was Charles H. Andrews, and he was named for his grandfather. My sister and Charles S. Andrews were at the time living on Massachusetts avenue. Their second child was born on Gloucester street in Boston on October 8th, 1894; its name was Paulita. After the marriage of Mr. Andrews to my sister, and after the time of their return from this wedding trip, he was not well at all. He was confined to the house more or less; he went to business part of the day. During the time that I was living at the house of the grandfather, Charles H. Andrews, I had known Kate H. Andrews. I knew her from the time she married Charles S. until they separated. After the marriage of my sister to Charles S. Andrews I saw something of Kate H. Andrews; I used to meet her in Boston. I couldn't tell how often she was in Boston, because she was at her house, I suppose. I met her in the summer mostly. At those times I had no talk with her. I heard her make a statement once to a lady about the marriage of my sister; she was in a car when my father-in-law and my husband and myself got into the car. She told her friend who we were, and said that my sister was married to her ex-husband, or whatever term she used, and that it was a very funny combination. That was in the summer of 1894, after the birth of the first child. From 1893, time of the marriage to my sister, down to the death of Charles H. Andrews, I saw her more than four or five times. I had no dealings with her, and no conversation with her other than that that I have stated. The date of the marriage of Charles S. Andrews to my sister was January 11, 1893. Both my sister and myself were daughters of Andrew Paul. I am familiar with my sister's handwriting, and that is her signature to the probate petition for the appointment of administratrix."

Paper passed to witness introduced in evidence, and marked "Exhibit 1, R. H. J."

On cross-examination the witness testified:

"I have known Kate H. Andrews from the time she married Charles S. Andrews, April 13, 1887, in Boston. They were married in St. Paul's church, I think; quite a wedding. After they were married in St. Paul's church I think they went abroad for a while. I don't remember just how long, but it was several months. When they returned they came to our house in Lynn, on Ocean street, No. 26. They remained there just a few weeks. I think they came there in July, but I am not sure. It was either July or the first of August, 1887. From there I think they went to Narragansett

Pier; I don't know how long they stayed there. In that fall they went into their house, 381 Commonwealth avenue. I don't
18 know how long they remained there. I did not go there. At this time Charles S. Andrews' business was speculating, I guess. There was a child born to Charles S. and Kate H. Andrews in the fall of 1888, I think. I knew of Charles S. Andrews leaving Boston after they went to housekeeping at 381 Commonwealth avenue. They went away in the summer time, and I think they went to Europe on a trip after that. After he returned to our house they had separated, and after he came to our house to live then he travelled out West. He started off to travel in different places and the next thing I knew he was in Dakota. He started off on a travelling excursion for his health, and because he said he had nothing here to live for; he had lost everything, and he wanted to start out anew in life. He returned the latter part of the summer of 1892, I think, just before his sister was married. He went away in the summer of 1891, and immediately on his return he came to our house. He did not say anything to me about what he had been doing; I had no conversation with him, and heard him say nothing as to his western trip. He came back and told me that he had his divorce from Kate H. Andrews. That was when he returned in the latter part of the summer of 1892. I knew they hadn't been living happily together, but I was not intimate enough with Mrs. Charles S. Andrews to know anything about them. I heard rumors to the effect that they were not living happily together, but I knew nothing about it myself. After he said that he had got a divorce from Kate H. Andrews he said he was going back out West again. He came on to visit us in the summer, and he was going back out West again, and he waited for his sister's wedding, which was in November. My sister met Charles S. Andrews when I was a little girl, when I first knew the Andrewses, I guess, just before I was married, and then she didn't see him for a good many years. I was married in 1887, and my sister had met him, I think, the summer before. He commenced paying attention to my sister after he returned from Dakota. He had not called on her before that, and had never seen her before that to my knowledge. When he came back from Dakota he did a little business on the 'Herald;' that was continuous up to the time of his death. I don't think I can tell you what salary he got on the 'Herald.' When he came back he came to our house, 26 Ocean street, and stayed there right along until he married my sister. My sister was not living there at the same time; she was living with her mother in Boston."

On redirect examination the witness testified:

"I was married in January, 1887, and after that, in July, I went to live at my father's house. I think my sister had just met Charles S. Andrews, just previous to our marriage; they met at my house when Charles S. Andrews came to my house. She may have met him before he went West that time, because she used to
19 come to see me and he was there, but that is all I know about the meetings at Charles H. Andrews' house."

Next the appellee offered the laws of the Territory of Dakota which

were in force in 1887, and which afterwards became, by enactment of 1890, at the time the Territory was admitted into the Union, the laws of the State of South Dakota, and which were the laws of the State of South Dakota in 1890, 1891, and 1892, and the sections of the Civil Code of the Compiled Laws of Dakota, sections 2558 to 2575, inclusive, which were admitted in evidence.

Next the libellee offered in evidence the laws of the State of South Dakota, chapter 105 of the Session Laws of 1890.

SEC. 1. The preamble of the act is, "An act re-enacting the laws of the Territory of Dakota, and declaring the common law in force. Be it enacted by the legislature of the State of South Dakota."

SEC. 1. (Re-enactment.) "All laws, in force in the Territory of Dakota at the date of the admission of the State of South Dakota into the Union and not repugnant to, or inconsistent with the constitution of said State, shall continue and be in full force and effect until altered, amended or repealed."

SEC. 2. "In any and all cases not controlled by the laws enumerated in sec. 1 hereof the common law shall be the law of this State."

SEC. 3. "Whereas no law is now in force providing for the re-enacting of the laws of Dakota Territory and declaring the common law in force, therefore an emergency exists, and this law shall be in force from and after its passage and approval. Approved February 6, 1890."

And the evidence so offered was admitted.

Next the appellee offered in evidence the record of the circuit court of the State of South Dakota, county of Minnehaha, in the case of Andrews *v.* Andrews, and the same was admitted in evidence, and is annexed to this bill of exceptions, and marked "Exhibit 4."

ANNIE ANDREWS, the appellee, testified in her own behalf as follows:—

"My name is Annie Andrews. I live at present in Lynn. I have lived there the last two years. I am the petitioner to the probate court for my appointment as administratrix of the estate of Charles S. Andrews. I was married to Charles S. Andrews on the 11th day of January, 1893. I was introduced to Charles S. Andrews in the summer of 1886, at my father's home, when he called upon my sister. That was in Boston. After 1886 I never saw him to speak to until he returned to his father's house early in 1890. I became intimately acquainted with him after he returned from Dakota. Before he went to Dakota, I saw him at his father's house, and that is all. At one time I heard him say, while living at his father's house, that he was going to leave Boston, either to make a trip around the world, or he was going to leave Boston altogether, as he had lost his home and everything, and was going away. He said he had lost everything that he had to live for in Boston, and he was going to leave the city. I remember that that conversation took place in the early part of 1890. After May, 1892, the first time that I saw him was round the 4th of July, 1892. That is the first time that I re-

member seeing him after 1890, and that was after he returned from Sioux Falls. After he returned, he said he liked Sioux Falls, South Dakota, and he intended to return there. I became engaged to him on the 2d of November, 1892, the day of his sister's wedding. At the time of his proposal for marriage to me, he said he wished to make South Dakota his home, and he asked me to go there with him, as he liked the country. He also said that he had been out there and lived there, and liked the place, and wished to make it his home; he didn't care to stay in Boston, and asked me if I was willing to go there and live, and I said yes. He was poor in health when I married him in January, 1893, and his father did not think it wise for us to start. He told me that he came to Boston to be present at his sister's wedding in November, 1892. He said he was making a visit to his father's for the summer at Swampscott. The reason that we did not go to Dakota was because he was too ill to go, and I was ill for the next two years, and death came into our family, and he didn't improve in health, but grew weaker until his father's and his own death. His sister Blanche died in October, 1893. After the time that we were married, we lived on Massachusetts avenue in the city of Boston, and I lived with him continually until he died. We were married in Boston. He died at Lynn. There were two children born of this marriage. They are the ones named in this petition. The first one was born October 17, 1893, the second was born October 8, 1894. After the time that I married Mr. Andrews he did a little work on the 'Boston Herald.' His father was one of the proprietors of the 'Herald.' He kept that work up regularly until his health failed in 1897. He was in poor health all the way up to 1897, when he commenced to fail rapidly. I knew that he was the correspondent for the 'Boston Herald' in South Dakota, and that was from what he told me. I do not know personally anything about any work that he did while out there. I know Mr. Whiting, the clerk of the proprietors of the 'Boston Herald.' I know his signature."

Witness was handed card dated "Herald office, Boston, September 1, 1891," signed "Whiting, clerk," and she identified the signature on the same as Whiting's handwriting. The card was marked "Exhibit 3," and admitted in evidence, and is hereto annexed.

21 Also card dated "Herald office, Boston, June 24, 1893," signed "Whiting," was offered, admitted in evidence, and marked "Exhibit 5," and is hereto annexed.

"At the time that we were married we took a trip away for just two days, for he was ill, too ill to stay away from the city of Boston, and we were obliged to return. My husband died of consumption."

Upon cross-examination the witness testified as follows:

"I was first introduced to C. S. Andrews in 1886, at my father's home on West Newton street in Boston, as he was calling upon my sister. I never saw him until the early spring of 1890 again to speak with, when he returned to his father's home. I remember seeing him at his father's house in the early part of 1890. The second time I saw him was in the early part of 1890. I never had any talk with him about his wife having obtained a decree for separate

support against him. He did not mention it at that time—not early in 1890. When he returned from Sioux Falls, Dakota, in 1892, he spoke about himself having an absolute divorce from Kate. * * * I never had any conversation with him about his wife Kate Andrews, in 1890, having obtained any decree against him in the probate court here, but in 1892, he said he had got a divorce from his wife Kate Andrews. He told me that in the summer of 1892 after he returned. I remember seeing him around the 4th of July, 1892, at his father's house in Lynn. I do not know that he returned prior to that. I had not seen him. I had not heard that he had been back some two months. I know that he returned with his father, but just the date I don't remember, because I didn't see him till the early summer, around July. He did not tell me when he got back. I never learned just the date when he got back. I did not hear from anybody that he came back in May or June prior to that. He was down at his father's house in Lynn for the summer. I did not stop at that house; I was at the Ocean house in Swampscott for the summer. Of course I was over at the house more or less during the summer; my sister there, she made her home with Father Andrews. During the summer of 1892 I saw C. S. more or less. At that time he was not engaged in any business here in Boston. At the time he told me that he got a divorce from Kate Andrews, all that he said was that he had an absolute divorce from Kate H. Andrews. He never gave any experiences that he had out in South Dakota to me; he never spoke of any of his affairs out there, and I don't know anything about any of his affairs when he was there. I never heard him talk to anybody about his affairs out there, and I never asked him about them. I did not know he was going out there. I knew
22 he was out West. I did not correspond with him. I knew he was out there in 1891 and 1892, from hearing his father speak of it. I don't remember just the year he left to go out there. I remember he was not in Swampscott in the summer of 1891. I knew he was out West. I didn't know where he was out West until I heard his father speak of it later, that he was in Sioux Falls, South Dakota. His father never said anything to me about his being out there trying to get a divorce. His sister married on the 2d of November, 1892, and I became engaged to him on that day, and I married him. He did not begin to be attentive to me as soon as he came back from the West, but I saw him more or less through the summer at Swampscott. We lived after marriage on Massachusetts avenue, Boston. I think he did a little work on the 'Herald' when I married him. I do not know what sort of work it was. He worked in the office until his health failed, and then he did his work at home. I don't know what you would call his work that he did at home. I know he had all the papers, and had to go through them and examine them, and put headings on them, and send them down. He used the scissors some. He had several different positions in the office. He changed from one thing to another—I don't know just the nature. It was in 1894 that he began to be off and on at the office. After 1894 he did some work for the office. He was some days at the office and some days at home doing his work,

but in 1896 I remember him more at home. In the summer of 1897, before his last sickness, he ceased to go to the office, and then he gave up entirely."

ROBERT M. MORSE, called as a witness for the appellee, testified as follows:

"I was counsel in the proceedings for separate support between Kate H. Andrews and Charles S. Andrews. I was asked the other day to look at my books and refresh my memory as to the dates, and having done so I can state that the proceedings in the probate court were in the early summer of 1891. Upon reflection, I am mistaken in regard to that; those proceedings were in the early summer of 1890."

The certified record of the proceedings in the separate-support case in the early summer of 1890 were offered by the appellee and were admitted in evidence, and are hereto annexed.

"There was an arrangement entered into between Mr. Peabody and myself in reference to the disposition of this separate-support matter."

The paper hereto annexed and marked "Exhibit 6," dated Boston, November 18, 1890, was handed to the witness, who testified:

"I recognize that paper before me as the memorandum of that settlement. The signature, or at least the handwriting of the initials, is mine."

23 The paper was offered in evidence and admitted, and marked "Exhibit 6."

"After this decree was entered into there was as matter of fact conveyances made in reference to the curtesy. The conveyance was really made to Mr. Morton in my office, in trust. I do not remember whether there were any other papers drawn, any papers relating to the personal property. There is no doubt that my client Kate H. Andrews, received from Mr. Peabody, or from the representatives of Mr. C. S. Andrews, all that property. In the course of investigation I did not find any other property that belonged to C. S. Andrews other than is conveyed in this paper here. The contest in the probate court was a spirited one, and went on at some length. I did not appear in any proceeding in Dakota for my client, nor instruct any counsel or assume any management in regard to any proceedings in Dakota. I was informed of the fact that proceedings had been brought in Dakota for divorce, and I had some correspondence with Mrs. Andrews on the subject, and some correspondence with Mr. Bartlett, representing Mr. Andrews. After the commencement of those proceedings in Dakota for and in behalf of Mrs. Kate H. Andrews I received the sum of $750, of *of* which about $250 covered the cash expenses in the proceedings in the probate court, and the rest of which was applied to the payment of the amount due me for services, but I am not able at this distance of time, without looking at the papers—and I have not had an opportunity to look at my check book, where there would be a memorandum—to state much further about it. I do not think that any agreement was executed in regard to it. I do not remember Mr

Dickinson in any way in the matter. I had nothing to do with taking depositions. As to where the $750 came from, and what it was for, I do not want to state positively. If I may say this, my best recollection is that I was advised that no opposition would be made to the granting of a divorce in the Dakota proceedings, but I should be very unwilling to say that that was at that time or in consideration of it. I think that it was the understanding that all the matters between the parties were settled at that time, and that this paper was made either in whole or in part as the consideration for the payment of that $750, but I should reserve the right to withdraw that statement if any papers in existence are inconsistent with it. My recollection is that there was something of that kind. I will say this: I looked at the memorandum book of my own services, and did not find anything on that book subsequent to the latter part of 1891, possibly the spring of 1892, and I do not think there is anything else which would help my memory, except possibly on consulting my check book, or in my cash book there might be a memorandum throwing some light on the matter. I have looked over my letter books. There is nothing. I have had copies made, and these are before me, of all the letters written by myself
24 to Mr. Bartlett, and of a letter written by myself to Mrs. Andrews, and these cover all of the correspondence between the 28th of November, 1891, and the 25th of March, 1892.

"As to whether the memorandum, Exhibit 6, produced by me, had anything to do with the Dakota proceedings, I can throw a little light on that, which comes to me now. After the proceedings in the probate court were closed at a subsequent period, I was consulted in reference to bringing a suit for divorce in this State in behalf of Mrs. Andrews. That correspondence, I think, relates somewhat to that matter. It was while the proposition to bring that suit for divorce was pending, and after Mr. Andrews, or his counsel, had been notified that the suit would be brought here, I was advised of a suit having been brought in Dakota by Mr. Andrews. The settlement that was made was subsequent to both those proceedings—that is, the payment of this $750. The order of proceedings, as I recollect it, was this: First, the proceedings in the probate court in this county for separate maintenance; a hearing on that petition; an agreement as to the terms of the decree; the entry of the decree, and a conveyance of the property, and nothing paid at that time, if I recollect rightly, in money, and no agreement for anything to be paid. Subsequently Mrs. Andrews consulted me in regard to bringing a suit of divorce for her against her husband, and I had various communications with counsel, and interviews with counsel on that subject, but did not, as I recall it, bring any suit for divorce. While that was pending I was informed of the proceedings which had been instituted by Mr. Andrews in South Dakota. What was done there, of my own personal knowledge, I did not know. It was subsequently to that, as I recall it, that this payment of money was made. Subsequent, I mean, to my knowledge of the proceedings out there this payment of $750 was made. That payment of $750 has nothing to do with that agreement (referring to Exhibit 6). I

put it that I was counsel in one suit in 1890 in the probate court, which was settled by that agreement, and subsequently there came some money to my client in the Dakota suit, which was paid through my hands, and appropriated for bills due me for services in the other suit. It is my recollection that the probate proceedings had nothing to do with what was subsequently (done) in Dakota."

Upon cross-examination the witness testified—

"I did not get the information in reference to Mr. Charles S. Andrews obtaining a divorce in South Dakota from him. It appears that I was first informed of the proceedings in Dakota on or about the 28th of November, 1891, and what I said in my note to Mrs. Andrews is, 'Meantime I hear through other sources that Andrews has brought a suit for divorce in South Dakota.' The other sources must have been somebody else than Mr. Andrews' attorney, because I have referred to him in the previous clause, so
25 that it must have been some information from outside, possibly seeing something in the newspaper, or in some other way getting information; at all events, I informed Mrs. Andrews in this letter that I had learned that Andrews had brought suit. I do not know whether that was her first knowledge of it. So far as I know, it was; at all events, I seemed to have informed her of it as a piece of news."

M. F. Dickinson, Jr., called as a witness by the appellee, testified as follows:

"My full name is M. F. Dickinson, Jr. I do not think I had anything to do with the case of Andrews and Andrews while it was in the probate court. I find some reference on my book to copy of a decree of probate court that I paid for and forwarded to Mrs. Andrews, but the first charge I have against Mrs. Andrews is in 1891; that was making a will for her in 1891; and that leads me to believe, as I have refreshed my recollection a little, upon examination, from my books, that that was the first time that I had any professional relations with her. I had an important case for her mother and sisters, growing out of a suit that was brought here by a(person who claimed to be a representative of the brother who was deceased, and that led to Mrs. Andrews consulting me about this matter finally. In the course of time, after the first business that I had transacted for Mrs. Andrews, I had something to do in reference to this Dakota suit, but I did not know anything about its institution and had something to do with some of the proceedings in it. I don't remember whether I took testimony in the suit, or whether the other side took it. I was present at Peabody's office when some testimony was taken, and whether I was present in New York when testimony was taken I don't know. I find on my books a reference to taking testimony in New York, but I can't recall whether I was there or not. I would not swear that I was or was not. I do remember, after the taking of testimony here in Boston, of having something to do with an amount of money that was paid. There was a sum of $300 that was ordered paid to Mrs. Andrews by the Dakota court, as I understood it,—whether it was alimony or money

for her expenses, or what not, I don't know. That came into my hands, $300, and it was paid to me by the senior Andrews, Charles H. Andrews, whom I knew; his sons I did not know. I gave $175 of that to Mrs. Andrews, and kept $125 myself. I ought to be excused for keeping so little; she thought I kept too much, and I am glad that I did not take any more. I can't remember about the sum of $2,050, whether it went through my hands or not. I haven't any record on my ledger of receiving such a sum nor of paying out such a sum, or any part of it, but in my correspondence with Mr. Rathbone of New York I refer to the agreement of $2,050, and I have some correspondence upon that subject with Mrs. Andrews. If I paid that money to anybody, I paid it to her. My recollec-
26 tion is that the check never ran to me; if it was paid by check, that I sent it directly to her. It was given to me to forward to her. She was in New York or Washington—I will not be sure about that, Mr. Bartlett, and I have tried to refresh my recollection about it. I remember the sum very well, and the agreement that was made about it. I don't remember whether the agreement was in writing or not. It was not made by parties in Dakota. It was made with Charles H. Andrews. My impression is that Mr. Charles H. Andrews gave me a bond that he would pay that sum to Mrs. Andrews when the Dakota divorce was obtained. I held his bond, I know that fact, and he made it good, and I gave the bond up to him. I can't remember the particular check for that $2,050, or anything about it. I know that I never had any part of it. It didn't go into my bank account, and I never had it. I think, from letters in my possession, I can be pretty sure that the whole amount was sent, whatever I received, to Mrs. Andrews; I know that. I had authority to accept that amount. I got that authority from my client.

"Q. You had authority April 30, 1892, to take $2,050?

"A. Well— This is a telegram from Washington:

"'4, 30, '92.

"'M. F. Dickinson, 616 Exchange building:

"'I accept the terms if you can do no better.

K. H. ANDREWS.'"

In reply to a question by the court, it was admitted by counsel for Kate H. Andrews that $2,050 was paid by somebody representing Mr. Andrews to somebody representing Mrs. Andrews, and that that was done before the decree of the divorce in Dakota was made. But it was denied that in consideration of that payment a release in the interest of his estate was made. The witness continued:

"There can't be any doubt about the fact that the money was paid; Mrs. Andrews will remember about it. But whether this check was made to her order, or I endorsed it, I can't recollect. I think it was made to her order, because she wrote me that she didn't want I should take any part of that money for any purpose. There was a question of settlement with Mr. Morse in it, I think, and she wanted the whole amount sent, and I sent it, and that's the truth of it, and

I have her letters in which that sum is mentioned, $2,050. She asked me on the 1st of May to send her the full amount when it was received, and not take anything out, or settle with anybody; that is the idea. There is another letter of April 20; you look at that, and there is another sum that is mentioned. I haven't looked at these papers for years, and I have forgotten about the detail
27 of it. Here is a telegram from Mr. Rathbone, dated the 22d of April, New York, asking what the amount she will receive is. Here is the authority for the settlement; that is your own signature. This paper was drawn in New York, and sent to me, was drawn by Mr. Rathbone evidently, because witnessed by him, and sent me as my authority for making the settlement. This is a document made by your own client, and forwarded to you, and it has been in my possession ever since. (Paper was offered in evidence and admitted; marked "Exhibit 7," and is hereto annexed.) The date of that paper is April 22, 1892. I got the $300 earlier than that. I got the $2,050 somewhere about the first of May; I can't state exactly. (Witness examined Exhibit 7.) I should say about this fourth clause that I was never called upon to do anything of that sort. Mr. Rathbone's deposition was taken in New York, I think, to prove the desertion; I think so, but perhaps that was abandoned. At any rate, evidence was taken here to prove the desertion. It never became necessary for me to consent or authorize anybody's consenting to the granting of the divorce, or anything of that kind; I never had any talk with Mr. Bartlett where anything of that kind was talked about. I did not talk much with him; I did my business with Mrs. Andrews and Mr. Rathbone in New York. I did spend nearly a day with Mr. Bartlett in taking testimony and other things. He was there representing one side, I think, and I was there representing the other, and we took testimony before Peabody, and then there was a question about somebody's bill, which made a good deal of discussion. I haven't any memorandum of a release that was drawn at the time of the payment of this money, or any copy of such a release, and what papers were executed I can't tell you, at the time Mr. Andrews paid me that money. I cannot tell whether I ever saw a release or not. I gave up the bond, evidently, because I haven't it in my possession, but whether I did anything more I can't tell you. I have here a letter from Keith & Bates; they are attorneys in Sioux Falls, Dakota, who had charge of Mrs. Andrews' interests there, written to Mr. Woodbury Blair of Washington, and sent to me by him, of April 18."

The appellee then offered in evidence the Compiled Laws of the Territory of Dakota, 1887, sections 2576 to 2585, inclusive.

The deposition of E. P. WHITE, taken and introduced on the part of the libellee, was as follows:

"My name is Edward P. White. I am fifty years old, and I am a stenographer, living in Chicago, Ill. In 1891, 1892, and 1893, I was official stenographer for the circuit court located at Sioux Falls, South Dakota. In 1891 and 1892 I was the official stenographer

for the circuit court of the second judicial district in the State
28 of South Dakota. As such stenographer I was present at the trial of the case of Charles S. Andrews, plaintiff, against Kate H. Andrews, defendant, in the said circuit court, in an action for divorce, and I made minutes of the evidence taken during the trial. I heard the testimony of Charles S. Andrews, plaintiff. I made notes in shorthand, and the notes are contained in the book that I had for that purpose, and were afterwards filed with the clerk of the circuit court in Minnehaha county, where I suppose they are at the present time. I cannot state all that Charles S. Andrews said in regard to his residence in Sioux Falls, and in regard to his voting at elections in South Dakota, or the time when he came to South Dakota, or the length of time that he had been there, or his intentions of staying there; but I know this: He said he was a *bona fide* resident, and that he came there with the intention of making that his residence; my remembrance is he testified that he voted there; the local residence there is three months, and I know he testified he had been there longer than that. I think he was there at least nine months. He testified it was his intention to make that his permanent home. I know that he testified that he lived there longer than the local residence, that he voted there, and I think he said he paid his poll tax, but I am not positive about that. This trial occurred in 1891. I knew Charles S. Andrews personally. I think I first met him in the winter of 1892, it was either 1891 or 1892, and I knew him during the spring and summer of that year. The last place that I saw him was at the trial."

The deposition of DANIEL B. GETTY of Sioux Falls, South Dakota, taken under a commission from this court, was introduced in evidence by the appellee. Witness testified:

"My full name is Daniel B. Getty; I reside in Sioux Falls, South Dakota; I am thirty-three years old, and am clerk of the South Dakota penitentiary. I was a clerk of election held for city officers upon April 19, 1892, in the city of Sioux Falls, South Dakota. I knew Charles S. Andrews, who resided in Sioux Falls, South Dakota, in 1891 and 1892, and I must have known him something like about a year. I don't just remember either when I first met him or when I last saw him. I understood that he came from Boston, or that he came from the East. The said Charles S. Andrews, who came from Boston, voted at the annual city election held on April 19, 1892. I have a recollection of his coming there, and I have his name registered in my handwriting. At that time he resided in ward 1, Sioux Falls, South Dakota."

Witness testified that he had the registry list of voters for the first
29 ward of the city of Sioux Falls for the annual city election held on April 19, 1892, and that he produced it and annexed it to the said deposition as a part of his answer to the 10th interrogatory. Registry list was annexed to said deposition and marked "Exhibit A, F. R. S.," and the registry list annexed is the original.

"I have examined the registry list, and state that Charles S.

Andrews' name appears on the registry list as C. S. Andrews, and also on the poll book as No. 330, in my handwriting. He was the same C. S. Andrews whom I knew, and who I understood came from the East, but I do not know on what business."

The deposition of JAMES L. ROBBINS, taken under a commission issued from this court, was introduced on behalf of the appellee. Witness testified:

"My name is James L. Robbins; age, thirty-nine; residence, Sioux Falls, South Dakota; occupation, laboring man. I resided in Sioux Falls, South Dakota, in 1892. I have resided there for twenty years this fall. I came here in 1878. I was one of the board of registry of voters in the spring election for city officers held on the 19th day of April, 1892, and the other members of the board of registry were George Lowry and Charles Clark. I was one of the board of election judges at that election in Sioux Falls, South Dakota, in ward 1. The other judges were George Lowry and Charles Clark. I do not remember Charles S. Andrews."

The witness produced the registry lists for ward 1 in the annual election of April 19, 1892, and annexed the original list to his deposition and made it a part of answer to interrogatory 10. Registry list marked "Exhibit A, F. R. S." Witness further testified that at the said election there was a book called a poll book. Witness produced poll book containing the names of the persons who voted in ward No. 1 in Sioux Falls, South Dakota, at the election held on the 19th day of April, 1892. Witness examined the poll book, and stated that the name of Charles S. Andrews, or C. S. Andrews, appears on said poll book as No. 330. The appearance of the name of C. S. Andrews on the poll book indicates that he voted at that election. This poll book is made up as the voters come in to vote; as they cast their ballot in the ballot-box their names are put on the poll book by the clerk of election. Witness produced the said poll book, and annexed the same to his deposition, and made it a part of the answer to interrogatory 18, and it was marked "Exhibit B, F. R. S."

"I know Charles S. Andrews, or C. S. Andrews, voted at the election held on the 19th day of April, 1892. I do not know where he came from."

The deposition of WILLIAM H. STODDARD, of Buffalo, N. Y., was introduced in evidence by the appellee. Witness testified:

30 "I am fifty-four years old and past; I live at No. 258 Baynes street, Buffalo, N. Y. I am an attorney-at-law. I have been engaged in practice since 1868. At one time in Sioux Falls, South Dakota. In 1891, 1892, and 1893 I resided in Sioux Falls. I knew Charles S. Andrews while there. I first became acquainted with him late in the summer or early in the fall of 1891, at Sioux Falls, South Dakota. I was one of the attorneys in an action for divorce where Charles S. Andrews was plaintiff and Kate H. Andrews was defendant, pending during the years 1891 and 1892, and during that time I examined titles for him, and drew some con-

tracts for real estate, and advised him generally about business matters in South Dakota. Charles S. Andrews lived at Sioux Falls, South Dakota, for about a year, to my knowledge. While there he lived at the Cataract house. The business that Charles S. Andrews was engaged in while he was in Sioux Falls, South Dakota, was that he reported for some paper in Boston, he loaned some money, and dealt some in real estate. He was the correspondent for the 'Boston Herald' in Sioux Falls during the time that he was there. He was doing a brokerage business and loaning money during the time that he lived there. I had several conversations with him in the summer of 1891 and spring of 1892, and he told me that he intended to live in South Dakota and make it his home. I distinctly recollect four occasions that he stated to me that he intended to become a resident of the State of South Dakota and make that his permanent home. I was with Andrews when he registered for the purpose of voting in the spring election for the city officers in 1892, in the city of Sioux Falls, South Dakota, but I did not see him vote. Charles S. Andrews told me personally that he voted, and my partner, William H. Wilson, also informed me that he voted, and was with him when he did vote. I saw him at and about the polling place on that election day. I had a conversation with him about it, and he told me that he had voted, and the conversation was in the presence of Mr. Buchanan, my partner W. H. Wilson, and Harry Carlton, who was a member of the election board, as I now recollect it. He at that time said that he was a citizen of South Dakota, as he had voted that day. I know that he registered as a voter in Sioux Falls. I saw him in South Dakota, I think, about the middle of May, 1892; I know it was later than the 10th. On that last occasion he told me that he was going back to Boston for a short visit, and was coming back to Dakota to live, and expected to be able to bring back $30,000 in money to invest in South Dakota property. Andrews remained continuously in Sioux Falls from the first time that I saw him until the spring or early summer of 1892, with the exception of about one week when he went to Boston on a visit. While here he made several contracts for real estate, which contracts I drew for him. He frequently consulted with me in regard to buying property in South Dakota near Sioux Falls. He made two or
31 three contracts for the purchase of a quarter section of land in Minnehaha county, to my knowledge, which contracts I drew."

Deposition of GEORGE W. LOWRY of Mason City, Iowa, was introduced by the appellee. Witness testified as follows:

"I am forty-five years old, and I am a druggist. In 1892 I resided in Sioux Falls, South Dakota. I resided there for thirteen years. I was one of the board of registry of voters in the spring election for city officers held on the 19th day of April, 1892, and I was one of the board of election judges at that election in ward 1, city of Sioux Falls. I knew Charles S. Andrews, a resident of Sioux Falls, South Dakota, in 1891 and 1892. I knew that he was engaged in litigation while there. I knew that he was the plaintiff

in a divorce case, in which he sought to recover a decree for divorce from his wife, Kate H. Andrews. The registry list for ward 1, annual election of April 19th, 1892, was turned over to the city clerk of the city of Sioux Falls, and by him, I think, to the county auditor. There was a poll book used at said election, and that was deposited with the same officer. I think Charles S. Andrews' name appears on the poll book as Charles S. Andrews, but I am not sure whether he registered as Charles S. Andrews or C. S. Andrews. The appearance of his name on the poll book indicates that he voted. That poll book is made up in this way: There are two clerks; those clerks include one of the judges of election. At that time my recollection was I gave out the votes. One judge took them. Robbins took them, and Clark kept one of the poll books. When a man comes and wishes to vote I hand him a ballot; he goes into his booth, marks his ballot, and gives it to Robbins, and Robbins puts it in the ballot-box; his name is called off by me, and written on the poll book. I knew Charles S. Andrews personally. I met him two or three days after he arrived in Sioux Falls, South Dakota, my store being the Cataract House drug store and he being a customer of mine almost from the time he arrived until he left. I should judge that he was there almost a year. The Charles S. Andrews who sued for a divorce in the city of Sioux Falls in the year 1891, and whose case was tried in 1892 is the same Charles S. or C. S. Andrews who was registered as a voter in ward 1 at said annual city election held on April 19, 1892. I did not see him sign his name on the registry list of voters. I knew that the same Charles S. or C. S. Andrews voted at that election and I know that the same Charles S. Andrews, or C. S. Andrews, who voted and registered in that April election of 1892 came originally to the State of South Dakota from Boston, Massachusetts, and I know that he was the same Charles S. Andrews who sued for a divorce in the State of South Dakota in 1891 and 1892."

32 On cross-examination witness testified:

"In order that a person may vote at a city election in the State of South Dakota he must be a *bona fide* citizen of the State and of the city. I could not say when Andrews left South Dakota, or the city of Sioux Falls; he may have been there a month after he got his divorce. While there he was engaged in no business, as far as I knew. Andrews boarded at the Cataract house, and the door opens from the Cataract house into the drug store kept by me, and he frequently came into my store, but purchased no intoxicating liquors. Andrews was classed as a divorcé, but as to whether he had any business I do not know. He spent a great deal of time about the Cataract house. Andrews did not say to me that as soon as he could obtain a divorce from his wife he should leave South Dakota and return to Boston, where he intended to reside, or any words to that effect."

JOSEPH L. GLOVER, a witness called by the appellant, testified as follows:

"My full name is Joseph L. Glover; I reside at Ardsley, Winchester county, N. Y. I am an attorney and counsellor at law, with an office at 100 Broadway, New York city. Since 1894 I have been engaged in business there. I was at one time engaged in business in the State of South Dakota. I first went to South Dakota in the early spring of 1890, I think, and left there in 1894. During my residence there I was a lawyer, attorney, and counsellor, and I was engaged in the practice of law all the time that I was there. I knew Charles S. Andrews; I first met him in the latter part of the summer or early fall of 1891. I knew him for seven or eight months, until the early summer or spring of 1892. I have never seen him since the spring or summer of 1892. From the spring and summer of 1892 until I left South Dakota I saw him in South Dakota, and at Sioux Falls; I never saw him in any place else except there, and the last I saw of him was when he left there, a day or two previous to the day he left. At all events, it was the day of the trial or hearing of his divorce case. During the time he was in South Dakota I saw him very frequently, often every day; probably three or four times a week after I first met him, anyway; it was shortly after he came there. While he was there he stayed at the Cataract hotel; it was an ordinary hotel, considered the best hotel in Sioux Falls for transient business. I used to talk with him whenever I met him. I never heard him speak of having any business in South Dakota; I never saw him do any business there. I consider that my associations with him were intimate. I can't tell you the time when I first talked with him about his business in South Dakota; I couldn't give you the exact date, but it was shortly after he came there. I had a conversation with him about his business
33 there. The substance of it was he told me he had come there for a divorce, and told me some of the facts of his case, which I disremember, except that he said the ground upon which he proposed to seek a divorce was desertion. In that conversation, or some subsequent conversation, he mentioned the name of his wife. He called her Kate or Katie. At subsequent times he talked with me about his business, and about what he came there for. The first conversation I am able to locate as in the late summer or fall of 1891. It was two weeks after, or very shortly after, he came there. After that I saw him frequently. I think I saw him next day. When I saw him I used to talk with him, as a rule; we used to play billiards frequently. At these subsequent times he talked about what he came there for again. Frequently little things were said; he told me when his case would be commenced; he used to speak of it frequently as so many more days or weeks, whatever the time might be, before he would institute his proceedings, before he would have been there the requisite amount of time. That length of time, he told me, was ninety days. In these conversations he mentioned the names of his attorneys. He frequently spoke of Judge Carland and Captain Stoddard as his attorneys. I remember the occasion, or about the time the action for alimony was argued; that was in the

latter part of the winter or early spring of 1892. On that occasi
I walked into the office of the Cataract hotel and met him in t
office. I had a conversation with him previous to the applicatio
and one subsequent to it. In the first conversation he stated th
he expected the motion to be heard in a few days. He said that
was very much dissatisfied and angered because Messrs. Keith
Bates had delayed him so long in bringing this motion on for
hearing, and that was the substance of his woes to me on that da
The following conversation which I had with him was on the eve
ing of the day on which the order fixing the amount of alimo
and attorneys' fees was made. That evening he was in a differe
frame of mind, and said that he had won, and that that determin
practically his case—that he was then sure that he would get a d
vorce. The Cataract house and my office were in the same bloc
The Cataract house is on the corner of Phillips avenue and 9
street, and my office is on the corner of Main avenue and 9th stre
I remember the evening of this second conversation because I play
billiards with him nearly all the evening after nine o'clock—wi
Mr. Andrews and a Mr. Pollock, and a gentleman known as Mr. E
liot, whose real name I afterwards learned was Elliot Zebroski. T
business of the other two gentlemen who were with me that nig
in South Dakota I knew: Pollock was there for a divorce, and Z
broski was there as the alleged cousin of Madame De Stuers. Af
this occasion I saw him frequently up to the time he left the State
he used to come into my office. He frequently spoke of Boston
had formerly lived there), and of the pleasure of living
34 Boston as distinguished from South Dakota; the vario
places of amusement in and about Boston, and the social a
vantages here as distinguished from Sioux Falls; and frequent
spoke of people and things in and about Boston, which were famili
to both of us; and he often remarked to me that as soon as he g
through with his divorce case there he should return. I never hea
him in any conversation express any intention or desire to remain
South Dakota or at Sioux Falls; quite the contrary. I heard hi
refer to Boston as his home on several occasions. I met his fath
Charles H. Andrews, in the office of the Cataract hotel, on the eve
ing of the day that the evidence in the divorce application was hear
and had about two minutes' conversation. I don't know what t
conversation was. It was in the spring of 1892. I remember th
much about it, that Charles S. Andrews said that they had had the
hearing, and that he expected to go home with his father. I do n
know how soon after that he left Sioux Falls. To the best of m
recollection, I never saw him there after that evening. At that ti
Sioux Falls was a place that was claimed to have a population
15,000 people, but, actually, it had perhaps 10,000 or 12,000. I ha
never seen Mr. Charles S. Andrews since."

The witness was shown a photograph, and testified that it was
photograph of Charles S. Andrews. Photograph was marked "E
hibit 2."

On cross-examination witness testified:

"I am thirty-four years old. I originally came from New Ham

shire. I did not practice there; I was in the office of a lawyer there. I was admitted to the bar in Michigan, June 20, 1899. I went to Sioux Falls in the spring of 1890, and was associated there with Mr. Donovan; afterwards associated with a Mr. Orr. I was deputy for the State's attorney at one time. There was a concern in Sioux Falls by the name of Stoddard & Wilson at one time. I couldn't tell just when it was. They might have been there about the time that Mr. Andrews was there; I believe they were together. They were together in 1892, I believe. Mr. Wilson, who appeared in the hearing in this present case, admitted that he was the Wilson of Stoddard & Wilson, and it was admitted that whatever the record of the South Dakota court showed Mr. Wilson had to do with it, that this was the Mr. Wilson. Mr. Wilson stated that there was no appearance by him in the suit."

Witness further testified:

"I have been practising law in New York since 1894. My attention was first called to this probate petition, I presume, about six months ago, by Mr. Wilson, if I remember correctly. I think he sent for me by letter, but the first that I knew about this matter came through Mr. Wilson; and before going on to the stand I have had a conference with him here in Boston. After the conversations occurred, the first time that they were called to my attention afterwards, it might have been six months ago, and this Mr. Wilson asked me in reference to any conversation which I had with Mr. Charles S. Andrews. I think he came over to New York to see me. I came here this time at the request of Mr. Wilson."

GEORGE P. NOCK, called as a witness for the appellant, testified as follows in response to questions by Mr. Wilson:

"My name is George P. Nock. I am a lawyer residing in New York city. I have been there three years in February, practising all the time. Previous to my going to New York I lived in Sioux Falls, South Dakota. I went to South Dakota in May, 1889, and left there in 1896. I was practising law there. I knew a gentleman who was introduced to me as Charles S. Andrews. He was living at the Cataract hotel in the city of Sioux Falls. As I remember it, I first saw him about September, 1891. I didn't get very well acquainted with Andrews at first. He came there in the fall; he remained there during the winter, and in the spring I got very well acquainted with him. We then got to be very close friends through a Mr. Pollock, whom I knew very well there. That acquaintance continued up to the time that he left. The last that I saw of him was some time in 1892. I am not sure about the month. He introduced me to a gentleman as his father, who was staying at the Cataract hotel, and he stated he had just concluded his trial, and that he was going to return to Boston the next day, or the day after, with his father. After that I was in Sioux Falls until 1896. I never saw him after that. During our friendship I had numerous conversations with him. I used to drive a great deal. I kept horses while I was there, and he was out with me on several different occasions riding. He took a drive with me one afternoon out west of the city, and he then told

me all about his troubles, particularly what the difficulty was with his first wife, and that he had come out there for the purpose of getting a divorce, and that he was interested in the 'Boston Herald.' He said to me that he had a business interest in the 'Boston Herald,' and that he was very anxious indeed to get back to Boston to look after his business. He also stated to me at that time that he was very much annoyed at the way Mr. Keith had delayed and kept him out there. He said Keith hadn't done right, and had lost him a great deal of valuable time, and a great deal of money in the business which I understood him to be connected with here. I had frequent talks with him afterwards. He and I and Pollock used to talk every time we met to the same effect. I can't tell you
36 Mr. Wilson, exactly what was said in those conversations, but the general gist of the conversations was that they were very much annoyed that they had to remain there so long, and he was very anxious to get back to what he called his home in Boston Massachusetts. I probably saw him two or three times a week. I never knew of Andrews being engaged in any business there."

The witness identified the picture marked "Exhibit 2" as the gentleman he was introduced to as Mr. Charles S. Andrews.

Upon cross-examination the witness testified that he received a letter from Mr. Wilson asking him if he could be here in Boston on Tuesday.

"There was no compensation, or none promised. I paid my own expenses. I think I was introduced to Andrews' father in May 1892. I know it was in the spring, or just as summer commenced. I think it was the day the divorce case was tried, because I remember he said when he introduced me, 'My father has been out here to testify in the case.' My attention was first called to this present case in November, this year. It was not called to my attention by Mr. Wilson. I met Mr. Glover in the street in New York city, and he asked me if I recollected Mr. Andrews."

CURTIS HUESTED WINSOR, called as a witness for the appellant, testified in answer to questions by Mr. Wilson, as follows:

"I reside in New York city, and have been practising law there. I went there three years ago last October. Previous to that I was in Sioux Falls practising law there for twenty-five years. I am fifty-one years old. I was admitted to the bar before I was twenty-one years of age, in South Dakota, to save questions. From 1870 to 1895 I practised law in South Dakota, when I went to New York and became a member of the firm of Maxwell, Chandler & Phillips of that place. I knew Charles S. Andrews, but I was not familiar with him. It was either in the fall or early winter of 1891, I think; it may have been in the fore part of 1892. I had a conversation with him about the first time I met him. He wished to retain me as an attorney in a divorce case which he had pending there, or expected to have, and it was in the Cataract house that he first spoke to me—that was the usual meeting place for business men there, and my office was across the street also from the Cataract house—and he asked me if he could retain me in the case. I told him that I un-

derstood he had attorneys, and that he could not talk to me about the case at all. He had Judge Carland and Captain Stoddard, and if there was any retainer it must come from them. I couldn't talk with him about the case. He was a little under the influence of liquor, I think, and he insisted
37 on telling me something about his matters. I don't remember particularly the details, except that he said he had come there for a divorce, and that he was going to move out of the damn country just as quick as he got it; that was about the substance of it, that he wouldn't live there. I had a subsequent talk with him; he came over to my office with Mr. Zebroski at another time; that was Elliot Zebroski, who afterwards married Madam De Stuers, and he again wanted to retain me, and I told him the same thing, that I couldn't be retained except through his attorneys. I remember the last time I saw him in the spring of 1892. There was a little balcony in front of the Cataract house where we used to sit evenings, with a sort of a balustrade, and I remember that he was sitting on that side of the entrance and I was sitting on the other, and he said he would like to introduce me to his father, and he introduced me to an elderly gentleman and said that it was his father, and said that he had practically got through with his business, and that he had to pay $150 counsel fee to settle, and that Captain Stoddard had played a good joke on Keith by putting all silver dollars in the bag and carrying them down to Keith, and Keith didn't like it; said he was soon going away, and that he was going back to Boston just as soon as he could go. I remained in Sioux Falls after that until October, 1895. I never remember seeing him there after that evening when he introduced me to his father. I never knew or saw Mr. Andrews engaged in any business there; he was a boarder at the Cataract house, and engaged in a good deal of pleasure, but not any business that I ever knew of."

On cross-examination the witness testified:

"My attention was first called to this by Mr. Wilson in a letter received from him, asking me if I would come here to testify in this case of Andrews *v.* Andrews. Nothing was called to my attention about it until I came here. I did not know what was wanted until I came. I was over here a short time ago, but I didn't see Mr. Wilson. I have not been promised any compensation. I will get my expenses paid, of course. I think Mr. Wilson has given me $35, and I have been here three days."

JAMES P. WADE, a witness called by the appellant, testified as follows:

"I reside in Cambridge. I knew Charles S. Andrews; I saw him several times in 1891, in the fall and during the summer. I had a talk with him whenever I met him. One time in the fall of 1891 he gave me a check for services I had done for him. That was on the corner of Water and Devonshire streets. He said I wouldn't see him again very soon for a while. I asked him why. He
38 said he was going out to Dakota to get rid of his wife. I

don't remember when I next saw him; it was quite a while befor I saw him again. I don't remember how long."

On cross-examination witness testified:

"I do not know the date of the conversation."

GEORGE H. ANDREWS, a witness called by the appellant, testifie as follows:

"I reside in Swampscott, Mass. I am a brother of the lat Charles S. Andrews. In the early part of 1891 he was in Bosto He lived at his home, 401 Beacon street. We were together there In the latter part of the spring or early summer of 1891 he said h was going to South Dakota to get a divorce from his wife, Kittie S Andrews. I believe he did go. The next time I saw him was year from that time, in the early part of the spring, 1892, here i Boston. He didn't do any business when he came back, to m knowledge; he stayed at home most of the time. When he cam back in 1892 I think he came to 401 Beacon street, the house of m father, Charles H. Andrews."

On cross-examination witness testified:

"My father, Charles H. Andrews, died the 1st day of June, 189 My brother's death was some two or three months after that; Oc tober, I believe. Charles S. Andrews left Boston in the early pa of the spring of 1891."

KATE H. ANDREWS sworn, and in her own behalf, testified:

"My full name is Kate H. Andrews. My father and mother ar living in Washington. My father is an officer in the United State Navy. I knew Charles S. Andrews, and was married to him on th 13th day of April, 1887, at St. Paul's church, Boston, by Bisho Courtney. After I was married I lived with my husband at 38 Commonwealth avenue. I lived at no other place than within th Commonwealth of Massachusetts. I went to Europe in 1887, an again in 1889, in the summer; otherwise I have always resided i Boston. I went abroad with my husband after I was married, an again in 1889. I never went with him out West; I never live with him out West."

On cross-examination the witness testified:

"There was a child born, and that child died in January
39 1889. Some time in 1890 there was a hearing in the probat court. During the progress of that hearing I was living i New York. I was with my mother and father at the New Yor hotel in New York. I had been living there in New York a fe weeks only. I had gone from here over to New York. I went fro Boston to New York with my mother and father; it was early i May, 1890. After these proceedings in the probate court they wer appealed and went to the superior court. Previous to the time o commencement of these proceedings I had been living at No. 38 Commonwealth avenue. I was living there at the time that I con sulted a lawyer in regard to my affairs. It was in March, some time 1890, and at that time Mr. Andrews was living there with me, an I consulted a lawyer in reference to those proceedings while Mr

Andrews was still in the house. Some time after the hearing in the probate court the house stood in my name, and before these proceedings I rented it, and after it. I first commenced to rent the house in the fall of 1890. I first rented the house for six months only to Mr. Samuel Hoar; he only had it for six months. After Mr. Hoar went out I was there the following summer with my mother, father and sister. That was in 1891. I remained in 1891 until the fall, when I was able to rent it. I was there for the purpose of putting the house in order and trying to rent it. I left the house, I think, some time in September, and went to Washington with my mother and father. That was in the late fall of 1891. I rented the house, I think, in September, if I remember correctly, of 1891, on a lease for three years. It came back into my hands, so that I had to rent it over again in the spring—I mean the spring of 1893. I then came to Boston and fixed it up again. I wasn't there myself that summer; I was here in Boston and had the house put in order, but I didn't occupy it. I was here in Boston while I was putting the house in order, for about two months. I stayed with my aunt at Newton, where I make my home always when I am in Boston. My aunt's name is Miss Baury. From 1893 down I came on here and stayed with my aunt at Newton; that is my home, in Newton, excepting when I visit my parents in Washington and other people; that is my home with my aunt in Newton, Miss Baury. I visit my parents in Washington, and other friends. Really, my home has been here looking after my property. I consider Boston my home; I have always resided here, and it is my home. When I speak of Washington, that's where I go to visit; that's where my father and mother live. I stay sometimes with them quite a while, then come back here, and am here for quite long intervals. I have stopped at other places besides Miss Baury's. I have stopped at 11 Beacon street."

The envelope marked "Exhibit 8," and letter marked "Exhibit 9," were then shown to the witness. Witness testified that they were in her handwriting and that the signature was hers.

40 The letter was offered in evidence, introduced, admitted, and hereto annexed marked "Exhibit 8" and "Exhibit 9."

"That letter was in 1895. I had seen Mr. Andrews, Sr., previous to that. I had had no interviews with him. I had seen Charles H. Andrews after the time of the divorce, but had had no conferences with him up to the time I wrote this letter. At the time that I rented the house the title to it stood in my name, and it came to me from Mr. Morton. Mr. Morton was the conduit from my husband round to me. There was a bill of sale of the furniture of the house given to me, so that I had all the furniture in the house. At the time the $2,050 was paid over by Mr. Dickinson I was here in Boston. That money was paid over to me by Mr. Dickinson. I got it at his office. I think it was Mr. Charles H. Andrews' check; I cannot be positive, but I think it was. I had previously received the other sums that were received for my benefit, the $300 and the $150. I knew about those sums of money, that they were ordered to be paid me. I knew that they were ordered by the court to be paid me, and ordered at the

request of my counsel, and that was afterwards paid me, and that was paid by Mr. Dickinson. At the time of the payment a paper was presented to me by Mr. Dickinson for my signature. The paper that was presented was this agreement, Exhibit 7. When it was presented to me I signed it. There was no other paper. Mr. Dickinson was not present at all. The paper that I signed I signed in New York. Mr. Dickinson dictated this agreement over the telephone; it was taken down in this gentleman's office, this Mr. R. C. Rathbone, of New York, who is a friend of my father's; his stenographer took down what Mr. Dickinson dictated, and which I was to sign, and it was for me to sign; that is the only paper I ever signed. At the time that I signed that paper the $2,050 was to be paid. I did not receive the money for some time afterwards. At the time I did receive the money I did not sign any paper, simply the money was handed over to me by Mr. Dickinson; that was in May, 1892, I think. The money was received by me in May, 1892, early in May, I do not remember the exact date. At the time I received that money I did not see Charles S. Andrews. I saw him after that time; I saw him on the horse car, coming down. I saw him several times on the street in Boston. I saw him once or twice in the theater. I didn't think anything about whether he was living in South Dakota or not. I did not know. After the time that I understood that he was in South Dakota, I saw him at one time; he came down to the house; that was in 1891, before he went to Dakota. After he returned, and after I got this $2,050, I did not see him or talk with him. I understood that he was living in Boston. I heard that he was around here."

The appellant then introduced in evidence original probate
41 papers of the county of Suffolk, No. 105,473, Kate H. Andrews *v.* Charles S. Andrews. This petition was filed in the probate court for the county of Suffolk by Kate H. Andrews, praying for a separate maintenance from her husband, Charles S. Andrews, on the 23d day of July, 1897, and asking for an attachment. Attachment was made by Albert C. Tilden, deputy sheriff, as per the return on the citation, August 10, 1897, in the sum of $20,000, in the estate of Charles S. Andrews. Messrs. Bartlett & Anderson appeared for the defendant, August 20, 1897.

RICHARD C. WHEELWRIGHT, a witness called for the appellant, testified as follows:

"I am the cashier in the office of the Herald Publishing Company in Boston, and have been there between sixteen and seventeen years. I knew Charles S. Andrews. By request I have examined the vouchers and books of the Herald Publishing Company to see whether Charles S. Andrews received any money from the Herald Company from June 1, 1891, to June 1, 1892, and I find he did not. All records of money paid employees were kept in my department at that time. All facts would appear in these books. Charles S. Andrews, some time after June, 1892, came into the employ of the Herald Publishing Company, and was on its pay-roll. He was not on the pay-roll up to the time of his death. He was on, off and on,

I don't think he was there steadily; I think sometimes he was away."

The deposition of CON HUDSON of Yankton county in the State of South Dakota was put in evidence by the appellant. Witness testified:

"My name is Con Hudson; I am thirty-three years old; I now reside in Charles Mix county, this State, near March post-office. Lived in Yankton county until the fall of 1897. I am a horse dealer by occupation. From the spring of 1891 to the summer of 1892 I lived in Sioux Falls, South Dakota. I was employed as bartender in the saloon connected with the Cataract house, and during the time I was there I became acquainted with Charles S. Andrews. I first met him in the saloon or billiard hall connected with the Cataract house in Sioux Falls. I think it was about the month of May, 1891; anyhow, it was in the spring or early summer of that year. During the time of the spring of 1891 to the summer of 1892 I met him every day, sometimes several times a day. I met him in the saloon almost every day, possibly sometimes in the office of the hotel, and occasionally on the street. Occasionally he would speak to me about his divorce. Of course sometimes would say something when he was having a good time in the saloon and would be drinking. I remember he said several times that he came there to get a divorce on account of the desertion of his wife. I
42 don't remember any of the details of his telling me, only that he said his wife deserted him. While he was having a good time I have often heard him speak with others in a general way about his divorce matter, and that he was out there for a divorce. These conversations took place in the saloon, either in the saloon or the billiard hall. You know the billiard hall was in the front room under the Cataract, and in the back room the saloon; kind of two rooms like. When he was out there he was boarding at the Cataract house. He never kept house that I know of. I don't think he did, for I never heard of it, and he was always there at the hotel. I don't remember whether I was ever at his room or not. I was there once. The time I happened to go up there was when they had been gambling downstairs, and they had given him a false dice box. I went up to tell him that the dice box was not right. I don't remember just what it was, but I know I went up to tell him about the dice box those gamblers had that wasn't right; and as far as I know he didn't pay any of that sum of money he lost that night, on account of my telling him about the false box. That was the only time I remember being at his room. I am quite sure he lived at the hotel all the time while he was in Sioux Falls. In his room he didn't have any property except his clothing that I saw or know of. I remember that he had a trunk and clothing in it; that is all the property that I know he had. I never knew of his having any other property. He sometimes hired a horse from the livery at Mark Bridge's barn there. I never knew he had any other property than what he had in his room there; not that I know of. I am sure he was not engaged in any business there, because I never saw him

at work or doing anything, and he was around the hotel all the time doing nothing there that I ever seen. During the period I saw him sometimes once a day, sometimes five or six times a day, just as it happened, sometimes probably more, sometimes I saw him frequently in the same day. In the fall of 1891 he said nothing to me, only he would talk about his divorce once in a while, and once in a while he would talk about Boston and New York, and what good times he could have there besides out here. He frequently told about his divorce, and said he was there for the purpose. I heard him speak frequently about that. He would talk sometimes with me and sometimes with others who were in the saloon at the time. I remember just a couple of days before he was going to have his trial he said he was going to have his trial and was sure to get his divorce. And afterwards he said that he got his divorce. He told me this, I suppose, in the spring of 1892 at the Cataract House saloon or billiard hall. He never told me that he intended to stay in Sioux Falls, but told me that he intended to go back to Boston just as soon as he got his divorce. As far as I could understand from his speaking and talking around with others, he came there just to get his divorce. He spoke in that kind of a way to me, as far as I can remember.
43 He didn't say exactly where he intended to live, only he said he was going back to Boston. He said he would not live in this country for anything. I can't tell just when Andrews came to Sioux Falls, only the first time I seen him was in either the last part of April or the first part of May, 1891, when I seen him first at the Cataract house in Sioux Falls. I don't remember about his speaking of the climate of South Dakota; he was always talking about the people in Boston, and how smart the people there were, and said the people out here didn't know anything; I know I had a fuss with him at one time about that same question. I don't remember whether he said anything about the climate or not, but I know he was always running down the people here and telling how smart the people in Boston were; that the people here didn't know much, they had not had much education or something. I never had any conversation with Andrews relative to his purpose in coming to Sioux Falls, only in regard to his divorce. He said he came there for a divorce, and this occurred several times when I heard him speak of the same thing during the time I knew him there at the Cataract house. I heard him speak several times as to how his divorce business was getting along. I think he went away from there the second or third day after he got his divorce; I think it was not longer than the third day afterwards. His father was out there; he came there after him. The last time I saw him was in the spring of 1892. It was quite nice weather. He said he had got his divorce and was going back to Boston. While Andrews was in Sioux Falls he associated with Pollock,—he was there for a divorce also,—and Algiers another divorce man, and also a man that came there with Madam De Stuers. He was called Elliot. His right name was Zorobrowsky, or something like that, and he was the man that married Madam De Stuers the day after she got her divorce. Andrews was most all the time

around with Pollock. He was his most intimate friend while they were there. When he was in my place of business he didn't do anything except stand around, drink, and play billiards. He told me that he wouldn't live in this country, and that he was going back to Boston to live just as soon as he got his divorce business fixed up."

This, together with the exhibits hereto annexed, is all of the evidence introduced in the said case and material to the issues raised by this bill of exceptions.

At the conclusion of all of the evidence in the case the appellee asked the court to rule,—

First. And now comes the appellee, and asks the court to rule that upon all the evidence in the case the appellant has no standing in this court, and is not a person interested in the estate of Charles S. Andrews, deceased.

Second. That upon all the evidence in the case the appel-
44 lant by her own conduct has connived at and acquiesced in the marriage of the said Charles S. Andrews and the appellee, Annie Andrews, and on account of said connivance and acquiescence in said marriage she cannot now be permitted to be heard to impeach the validity of said marriage.

Third. That upon all the evidence in the case the appellant by her own conduct has connived at and acquiesced in the marriage of the said Charles S. Andrews and the said appellee, Annie Andrews, and, without objection, has allowed the said marriage relations to exist and children to be born of the said marriage, and she cannot now be heard to impeach the validity of said marriage by attacking the validity of the divorce procured in the circuit court of South Dakota by the said Charles S. Andrews against her.

The presiding justice refused so to rule, to which refusal to rule the appellee duly excepted; but the presiding justice found the following facts, and ruled as hereinafter set forth:—

Findings of Fact.

SUFFOLK, *ss:*

Supreme Judicial Court.

ANNIE ANDREWS, Adm'x,
v.
KATE H. ANDREWS, App't. } No 6084.

I find the following facts:—

Charles S. Andrews (being then about twenty-one years of age and domiciled in Boston) and the appellant were married there April 13, 1887, and thereafter lived in Boston as husband and wife until the latter part of April, 1890, at which time the wife, claiming to have justifiable cause therefor, left her husband and began a suit for separate maintenance, which was finally settled in December, 1890, in the manner disclosed by the evidence, in accordance with the agreement of November 18, 1890.

A child, the only issue of this marriage, died in January, 1889. In the summer of 1891 the husband, being then and ever since his

marriage domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of that State to gain a domicile there, and on November 19, 1891, filed a petition for divorce in the proper court of that State. The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement "to consent to the granting of divorce for desertion in South Dakota," she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897.

The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated. After the wife left her husband in 1890, she visited some time in New York, but had her home in Boston. In the fall of 1891 she leased her house in Boston for three years, and in November, 1891, went to stay with her parents in Washington, D. C., indefinitely, and since that time has remained a part of the time with her parents at Washington and a part of the time with her aunt in Newton in this State. I do not find that since her marriage her domicile has been changed, unless, as a matter of law, it was changed to South Dakota when her husband went there. She has always since her marriage intended that her home should be in this State, and considered it to be here.

I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated.

Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children still living.

The petitioner at the time of the marriage believed that the said Charles had the right to marry. She had nothing whatever to do with the divorce, was in no way the alleged or actual cause of the disagreement between the said Charles and the appellant, and throughout has acted in the utmost good faith. She knew of the divorce, but believed it was legal, and had reason so to believe.

The appellant knew of this second marriage soon after it occurred, and never took any steps to have it declared illegal, except that on July 23, 1897, she filed in this court a petition for separate maintenance against the said Charles, which was pending at the time of his death, and that she has appeared in this present case;
46 and it does not appear that until after the death of the father of said Charles in June, 1897, she even claimed or believed the divorce illegal, or had any idea of making such a claim.

I find, if the finding is warranted by the above facts, that the appellant connived at and acquiesced in the second marriage. I decline, however, to rule as requested by the petitioner in the paper hereto annexed.

I rule that the divorce obtained in South Dakota is, by Pub. Sts., c. 146, sec. 41, of no force or effect in this Commonwealth; that the respondent must be regarded as the lawful wife of the said Charles, that the second marriage was therefore illegal; and having so ruled I order the decree of the probate court to be reversed and case remanded to said court.

To all of which rulings and orders the appellee duly excepted, and now asks that her exceptions to the refusal of the presiding justice to rule as requested, and her exceptions to the rulings made by the presiding justice, be allowed.

ANNIE ANDREWS,
By BARTLETT & ANDERSON,
Her Attorneys.

Filed March 2, 1899.

Exceptions allowed.

JOHN W. HAMMOND, *J. S. J. C.*

Request for Extension of Time for Filing Exceptions.

And now comes Annie Andrews, administratrix, appellee, and asks that the time for filing exceptions to the rulings and refusals to rule of the presiding justice, at the trial of said cause, may be extended to and including Thursday the 2d day of March, 1899.

ANNIE ANDREWS,
Administratrix,
By BARTLETT & ANDERSON,
Her Attorneys.

Allowed.

JOHN W. HAMMOND, *J. S. J. C.*

(*Exhibits Annexed to Bill of Exceptions.*)

EXHIBIT 3, W. R.

HERALD OFFICE, BOSTON, MASS., *Sept.* 1, 1891.

This certifies that C. S. Andrews is an authorized reporter and correspondent for the Boston Herald at South Dakota.

47 Unless previously revoked, this certificate expires on the 1st day of Sept., eighteen hundred and ninety-two, at which time it must be returned for exchange.

No. 476. THE BOSTON HERALD CO.,
By FRED E. WHITING, *Clerk.*

EXHIBIT 4.

UNITED STATES OF AMERICA.

STATE OF SOUTH DAKOTA, }
County of Minnehaha, } *ss:*

I, Albion Thorne, clerk of the circuit court of the second judicial circuit in and for said county of Minnehaha, State of South Dakota, having by law the custody of the seal and all the records, books, documents and papers of, or appertaining to said court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said court, and on file and of record in the office of said court, to wit:

Summons, complaint, affidavit and order for publication of summons, notice of appearance, affidavit of defendant's attorney, order, answer, affidavits of defendant and defendant's attorney in support of motion for temporary support, expenses and counsel fees and affidavits of plaintiff, Charles H. Andrews, Blanche Andrews, and George H. Andrews in opposition thereto, order for payment of expenses and attorney fees, receipts, notice of withdrawal of appearance, findings of fact, conclusions of law and decree in an action heretofore pending in said court, wherein Charles S. Andrews was plaintiff and Kate H. Andrews was defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 20th day of May, A. D., 1892.

{ The Circuit Court, Minnehaha County, State of South Dakota. Clerk. }

[SEAL.] ALBION THORNE,
Clerk of the Circuit Court of the Second Judicial Circuit in and for Minnehaha County, State of South Dakota.

UNITED STATES OF AMERICA.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

I, Frank R. Aikens, judge of the circuit court of the second judicial circuit, within and for the county of Minnehaha and State of South Dakota, do hereby certify that Albion Thorne, Esq., whose signature is affixed to the annexed certificate and attestation, is the clerk and proper certifying officer of said court, and has, by
48 law, the custody of the seal and all the records, books, documents and papers of, or appertaining to said court, and that said certificate and attestation are in due form, and entitled to full faith and credit.

In witness whereof I have hereunto set my hand this 26th day of May, A. D. 1892.

FRANK R. AIKENS,
Judge of Circuit Court.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

I, Albion Thorne, clerk of the circuit court of the second judicial circuit in and for the county of Minnehaha, State of South Dakota, hereby certify that Frank R. Aikens, Esq., whose signature is affixed to the foregoing certificate, is the sole presiding judge of said court, duly commissioned and qualified, and that his certificate is in due form, and entitled to full faith and credit.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 27th day of May, A. D. 1892.

{The Circuit Court, Minnehaha County, State of South Dakota.}

[SEAL.]

ALBION THORNE,
Clerk of Circuit Court.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff,
vs.
KATE H. ANDREWS, Defendant. } Summons.

The State of South Dakota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which said complaint will be filed in the office of the clerk of the circuit court of the second judicial circuit of the State of South Dakota, within and for the county of Minnehaha and to serve a copy of your answer to the said complaint on the subscribers at their office in the city of Sioux Falls in the county of Minnehaha, in said State of South Dakota, the said city of Sioux Falls being a place where there is a post-office, within thirty days after the service of this summons upon you, exclusive of

the day of such service; and if you fail to answer the said co plaint within thirty days after the service of this summons up you, the plaintiff in this action will apply to the court for the rel demanded in the said complaint.

Dated November 19", A. D. 1891.

W. H. STODDARD,
JOHN E. CARLAND,
Attorneys for Plaintiff, Sioux Falls, Minnehaha County, South Dakota.

49 STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

I, John Sundback, sheriff of the county of Minnehaha and St of South Dakota, do hereby certify that the within summons ca into my hands for service on the 19" day of November, A. D. 18 That I have made diligent search for the said defendant, Kate Andrews, and that said defendant after diligent search cannot found within the said county of Minnehaha aforesaid, and that s is not a resident thereof.

Dated this 19" day of Nov., 1891.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff,
vs.
KATE H. ANDREWS, Defendant. } Complaint.

Plaintiff complains of the defendant and alleges:

I.

That the plaintiff now is and for more that ninety days last p has been a *bona fide* resident in good faith of the State of South D kota.

II.

That heretofore and on the 13th day of April, A. D. 1887, t plaintiff and defendant intermarried at the city of Boston in t State of Massachusetts, and ever since have been and now are h band and wife.

III.

That on or about the first day of May, A. D. 1889, the said defe ant disregarding the solemnity of her marriage vow wilfully a without cause deserted and abandoned this plaintiff and ever sin has and still continues so to wilfully and without cause desert a abandon said plaintiff and to live separate and apart from him wi out any sufficient cause or any reason and against his will and wi out his consent.

IV.

Plaintiff further shows that the act aforesaid was committed by the defendant without the consent, connivance or procurement or previous knowledge of this plaintiff, and that he has in nowise condoned the offence, aforesaid.

V.

Plaintiff further shows that there are no children born of the said marriage, and that the desertion aforesaid was without cause and contrary to the wishes of this plaintiff.

Wherefore plaintiff demands judgment that the marriage relations now and heretofore existing between this plaintiff and the defendant may be dissolved, and that plaintiff have such other and further relief as to the court shall seem just and proper.

W. H. STODDARD,
JOHN E. CARLAND,
Attorneys for Plaintiff.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

Personally appeared Charles S. Andrews, who being duly sworn deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge, excepting as to those matters stated therein to be alleged on information and belief and as to those matters he believes it to be true.

CHARLES S. ANDREWS.

Subscribed and sworn to before me this 19th day of November, A. D. 1891.

FRANK R. SIDWELL,
[SEAL.] *Notary Public, Minnehaha County, S. D.*

Filed this 19 day of Nov., 1891.
ALBION THORN,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff,
vs.
KATE H. ANDREWS, Defendant.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

Personally appeared Charles S. Andrews who being first duly sworn deposes and says: That he is the plaintiff in the above-entitled action; that he resides in the county of Minnehaha and State of South Dakota; that a summons has been issued herein and the com-

plaint herein duly filed in the office of the clerk of the circuit cou
in and for the second judicial circuit in the city of Sioux Falls
the county of Minnehaha and State of South Dakota; that this a
tion is for divorce upon the ground of desertion, which will mo
fully appear in the plaintiff's complaint, a copy whereof is here
annexed and made a part of this affidavit; that the defenda
Kate H. Andrews cannot after due diligence be found with
51 the State of South Dakota, as will appear by the certificate
the sheriff of Minnehaha county annexed to the origin
summons in this action; that the defendant is a proper party d
fendant in this action and the party against whom the relief in th
complaint is demanded; that the defendant Kate H. Andrews do
not reside in the State of South Dakota and is not a resident of th
said State, and that service of the summons herein cannot be ma
upon her, the said defendant, within the State of South Dako
aforesaid; that defendant does not reside within the State of Sou
Dakota, but is a resident of Boston, in the State of Massachuset
and that she is now temporarily absent from the said State of Ma
sachusetts, and her present place of abode is at 1312 Connectic
avenue, Washington, D. C.; that plaintiff knows the said facts
his own knowledge by reason of having received letters from h
father who resides in Boston of the place of residence of the sa
defendant, and by reason of having heard by letters received fro
Boston, that the said defendant was temporarily absent from the ci
of Boston, and that her present post-office address is No. 1312 Co
necticut avenue, Washington, D. C., and that he learned the sa
facts from a letter from his father Charles H. Andrews, who resid
in the city of Boston, who well knows this defendant and is famili
with all the facts in regard to the residence and present abode
this defendant.

CHARLES S. ANDREWS.

Subscribed and sworn to before me this 19th day of Novemb
A. D. 1891.

FRANK R. SIDWELL,
[SEAL.] *Notary Public, Minnehaha County, S. D.*

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff,
vs.
KATE H. ANDREWS, Defendant. } Complaint.

Plaintiff complains of the defendant and alleges:

I.

That the plaintiff now is and for more than ninety days last p
has been a *bona fide* resident in good faith of the State of Sou
Dakota.

II.

That heretofore and on the 13th day of April, A. D. 1887, the plaintiff and defendant intermarried at the city of Boston in the State of Massachusetts, and ever since have been and now are husband and wife.

52

III.

That on or about the first of May, A. D. 1889, the said defendant disregarding the solemnity of her marriage vow wilfully and without cause deserted and abandoned this plaintiff and ever since has and still continues so to wilfully and without cause desert and abandon said plaintiff, and to live separate and apart from him without any sufficient cause or reason and against his will and without his consent.

IV.

Plaintiff further shows that the act aforesaid was committed by the defendant without the consent, connivance or procurement, or previous knowledge of this plaintiff, and that he has in nowise condoned the offense aforesaid.

V.

Plaintiff further shows that there are no children born of the said marriage, and that the desertion aforesaid was without cause and contrary to the wishes of this plaintiff.

Wherefore plaintiff demands judgment that the marriage relations now and heretofore existing between this plaintiff and the defendant may be dissolved; and that plaintiff have such other and further relief as to the court shall seem just and proper.

W. H. STODDARD,
JOHN E. CARLAND,
Attorneys for Plaintiff.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

Personally appeared Charles S. Andrews, who being duly sworn deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge, excepting as to those matters stated therein to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES S. ANDREWS.

Subscribed and sworn to before me this 19th day of November, A. D. 1891.

FRANK R. SIDWELL,
[SEAL.] *Notary Public, Minnehaha County, S. D.*

53 STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

It appearing to my satisfaction by the affidavit of Charles S. drews and the sworn complaint herein that a cause of action e against the defendant Kate H. Andrews, and that the defenda not a resident of the State of South Dakota, and cannot with diligence be found therein, and is a non-resident of said State a resident of the State of Massachusetts, and that her present abo No. 1312 Connecticut avenue, Washington, D. C.:

Now on motion of the plaintiff herein, it is ordered that the s mons herein, a copy whereof is hereto annexed, be served upon said defendant, Kate H. Andrews, by publication thereof in Sioux Falls Weekly Press, a newspaper printed and publishe the city of Sioux Falls in the county of Minnehaha and Sta South Dakota, said newspapers being most likely to give notic said defendant in this action, for six consecutive weeks and th copy of the summons and complaint in this action be forthwith posited in the post-office at Sioux Falls, South Dakota, directe this defendant at No. 1312 Connecticut avenue, Washington, D enclosed in an envelope securely sealed with the postage pre thereon, and that personal service upon the said defendant of a c of the summons and complaint in this action outside of the Sta South Dakota shall be equivalent to the due publication of the s mons in this action.

By the court:

FRANK R. AIKENS, *Judg*

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court Thereof, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs. } Summons.
KATE H. ANDREWS, Defendant. }

The State of South Dakota to the above-named defendant:

You are hereby summoned and required to answer the compl of the plaintiff in the above-entitled action, which said compl will be filed in the office of the clerk of the circuit court of second judicial circuit of the State of South Dakota, within and the county of Minnehaha, and serve a copy of your answer to said complaint on the subscribers at their office in the city of Si Falls in the county of Minnehaha in said State of South Dak

the said city of Sioux Falls being a place where there is a
54 post-office, within thirty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within thirty days after the service of this summons upon you, the plaintiff in this action will apply to the court for the relief demanded in the said complaint.

Dated November 19", A. D. 1891.

W. H. STODDARD,
JOHN E. CARLAND,
Attorneys for Plaintiff, Sioux Falls, Minnehaha County, South Dakota.

To the above-named defendant:

Please take notice that the complaint in the above-entitled action was filed in the office of the clerk of the circuit court of the second judicial circuit at Sioux Falls, Minnehaha county, S. D., on the — day of November, 1891.

W. H. STODDARD,
JOHN E. CARLAND,
Pl'ff's Att'ys.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff,
vs.
KATE H. ANDREWS, Defendant.

You will please take notice: That the undersigned have been retained by the defendant in the above-entitled action and appear for the said defendant therein, and demand a copy of the plaintiff's complaint in said action which may be served on the subscribers at their office on Phillips avenue in the city of Sioux Falls, Minnehaha county, State of South Dakota.

Dated January 2nd, 1892.

KEITH & BATES,
Attorneys for Defendant.

To William H. Stoddard and John E. Carland, Esqrs., attorneys for plaintiff.

We admit due and personal service of the within notice of retainer upon us, made at Sioux Falls, S. D., on this 2nd day of January, 1892.

STODDARD & WILSON,
JOHN E. CARLAND,
Attorneys for Plaintiff.

55 STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs. }
KATE H. ANDREWS, Defendant. }

STATE OF SOUTH DAKOTA, } ss:
County of Lake, }

H. H. Keith being first duly sworn deposes and says that he is one of the attorneys for the defendant in the above-entitled action. That this deponent has had sole charge of the preparation of the answer in said action. That this action was brought by the plaintiff against the defendant for the purpose of dissolving the marriage contract theretofore entered into between said plaintiff and defendant. That an order of publication was obtained by the plaintiff in this action and personal service of the summons and complaint therein made on the defendant at the city of Washington, D. C. That the firm of Keith & Bates was employed by the defendant in this action about the first day of January, 1892, by telegram from the defendant, which telegram was followed by a letter. That said firm of Keith & Bates appeared in said action and demanded a copy of the complaint which was thereafter served upon said firm of Keith & Bates. That this deponent immediately after receiving said telegram and letter from the said defendant wrote to the defendant at Washington, D. C., where she then was, for a statement of the case and of the facts constituting her defense to said action. That said defendant replied to said letter and gave a meagre statement of the facts of said case, but not with sufficient fullness and definiteness to enable this deponent to prepare an answer for said defendant in said action. That this deponent replied to said letter and requested her to give a full and complete statement of the facts constituting her defense to said action. That before a reply from said last-mentioned letter was received the time for answering was about to expire, and this deponent applied to this court for an order extending the time to answer in said action for the reason that it had been impossible to get a full and complete statement of the facts of the case to enable this deponent to prepare a proper answer in said action. That such extension was given on the 29th day of January, 1892, extending the time to answer until the 20th day of February, 1892, and that on or about the 18th day of February, 1892, this deponent received from the said defendant a statement of the case, giving the dates, facts and circumstances constituting the several acts of cruelty and other matters of defense set forth in her answer herewith presented. That on or about the 22nd day of February, 1892, in getting ready to draw an answer in said action this deponent discovered that the time fixed in said order extending the time to answer had expired on the 20th day of February, 1892. That this

56 deponent had in mind that said order granted by this court on the 29th day of January, 1892, had extended the time to answer in said action thirty days from that date, and that through inadvertence and mistake a memorandum had been entered upon the papers in the case to the effect that the time for answering in said action would expire thirty days from the 29th day of January, 1892, and that an answer should be drawn at that time; that not only was such a memorandum extered upon the papers in the case but this deponent had it thoroughly fixed in his mind that said order extended the time to answer thirty days and that it would not expire until about March 1st, 1892. That on the 20th day of February, 1892, W. H. Wilson, a member of the firm of Stoddard & Wilson, one of the attorneys for the plaintiff in this action, was in deponent's office talking about the case, and inquired of this deponent whether he intended to serve an answer in the case, and that this deponent told said Wilson that the very next work he did would be to prepare and serve an answer in said action, not thinking and not knowing that the time for answering would expire that day, and that said Wilson made no mention of the fact to this deponent.

And this deponent further says that from the statement of the case made to deponent by the defendant, this deponent verily believes that the said defendant has a good and substantial defence to said action upon the merits; that the reason this affidavit is not made by the defendant herein is that said defendant is now in the city of Washington, D. C., and this deponent has not time to send an affidavit to her for her to swear to in order to make this application within the time limited by the order of the court herein in which to obtain an order to show cause why plaintiff's attorneys should not receive the answer of the defendant in said action. That the reason why an answer in this action was not prepared and served sooner was owing to the fact that deponent was unable to get all the facts and circumstances in the case until about the 18th day of February as hereinbefore stated. That this deponent has used due diligence in obtaining the facts in the case from the defendant and only for the mistake made by this deponent in reference to when the time for answering in said action would expire, as hereinbefore set forth, the defendant would not have been in default. That such inadvertence and mistake on the part of this deponent is no fault of the defendant's, and that in all the correspondence had with her she has a good and meritorious defense and that all of the facts set forth in the answer herewith presented are true.

And this deponent further says that the reason why the answer herein is not verified by the said defendant is that this deponent has not time to send the same to Washington to have the same sworn to by the said defendant in order to present the same upon this application under the order of the court herein granted on the 22nd day of February, 1892, limiting the time to ten days in which to apply to the court for an order for the plaintiff to show cause why the answer of the defendant in said action should not be received by said plaintiff.

57 This deponent further says that the next term of this court to be held in said Minnehaha county, State of South Dakota, wherein this action is now pending, does not commence until the 26th day of April, 1892, and that that is the first term of court at which said action could be tried, and that the plaintiff has suffered no injury, or inconvenience in any way by the mistake of this deponent in not answering on the 20th day of February, 1892.

This deponent further says that immediately upon discovering said mistake as hereinbefore set forth, C. P. Bates, one of the firm of Keith & Bates, attorneys for the said defendant, went to the office of W. H. Stoddard, one of the attorneys for the plaintiff, and informed the attorneys for the plaintiff of said mistake and told them that said defendant's attorneys would like to serve an answer for said defendant in said action. That said Stoddard was absent from the office but that said W. H. Wilson informed said Bates that they could not receive an answer in said action. That this deponent immediately prepared an affidavit and obtained an order from this court staying all proceedings on the part of the plaintiff for ten days in which to obtain an order for the plaintiff to show cause why the defendant should not be allowed to serve an answer in said action; that said order was obtained from the judge of this court on the train at Sioux Falls while said judge was on his way from the city of Canton, where he resides, to the city of Madison, in Lake county, to attend a term of court. That this deponent saw Mr. Stoddard and told him that he should be obliged to get an order staying proceedings until he could move the court to allow the defendant to serve her answer in said action and afterwards showed said Stoddard said order granted by the court staying proceedings.

This deponent further says that since preparing the answer which is hereto annexed he has offered to serve the same upon W. H. Stoddard, Esq., one of the attorneys for the plaintiff, and that said Stoddard declined and refused to receive the same.

Wherefore, this deponent in behalf of said defendant asks for an order for the said plaintiff to show cause why this defendant should not be allowed to serve her answer in said action.

H. H. KEITH.

Subscribed and sworn to before me this 23rd day of February, 1892.

FRANK R. AIKENS,
Circuit Judge, 2nd Jud. Cir., S. D.

Upon the annexed and foregoing affidavit of H. H. Keith, the annexed proposed answer of the defendant in said action, the summons, complaint, and upon all the papers, files and proceedings taken and had in said action, let the plaintiff show cause be-
58 fore this court at the court-house in the city of Flandreau, in Moody county, State of South Dakota, on the first day of March, 1892, at the hour of two o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why the said defendant in this action should not be allowed to serve and file her answer

in said action, and why the said defendant should not have such other, further or different relief as she may show herself entitled to upon the hearing of this order, and in the meantime and until this order is heard and determined all proceedings on the part of the plaintiff are stayed.

Dated this 23 day of February, 1892.

By the court:

FRANK R. AIKENS, *Judge.*

We admit due and personal service of the within papers upon us made at Sioux Falls, S. D., on this 24th day of February, 1892.

W. H. STODDARD,
JOHN E. CARLAND,
Attorneys for Plaintiff.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

The defendant in the above-entitled action for answer to the plaintiff's complaint in said action,

1. Denies that the plaintiff now is or ever has been a *bona fide* resident in good faith of the State of South Dakota; but alleges that the plaintiff is and at all of the times mentioned in the complaint in this action was a resident of the city of Boston in the State of Massachusetts, and that said plaintiff came to the State of South Dakota for the express purpose of procuring a divorce from this defendant, and not otherwise.

2. The defendant admits that the plaintiff and defendant intermarried on the 13th day of April, 1887, at the said city of Boston in the State of Massachusetts, and ever since said time have been and now are husband and wife as alleged in paragraph two of said complaint.

3. This defendant denies paragraph three of said complaint and each and every allegation therein contained. And this defendant expressly denies that she ever deserted and abandoned the plaintiff as alleged in said paragraph three, or otherwise.

59 4. This defendant denies paragraph four of said complaint and each and every allegation therein contained.

5. Defendant admits that there are no children living of the issue of said marriage, but alleges that there was one child born to plaintiff and defendant, the issue of said marriage, which child died on or about the 13th day of January, 1889.

6. This defendant further answering says that during all of the time that this defendant lived and cohabited with said plaintiff she conducted herself with propriety and managed the household affairs of her said husband with prudence and economy and at all times treated her said husband with kindness and forbearance, and was at

all times true and loyal to her marriage vows and was a faithful and affectionate wife to the said plaintiff, but that the said plaintiff, disregarding his marriage vows, within two or three months after their said marriage commenced a systematic course of unkind, harsh and tyrannical conduct towards this defendant, which course of conduct on his part continued with very slight intermissions until this defendant was obliged to leave said plaintiff and live with her friends as hereinafter set forth.

7. That the said plaintiff is a man of depraved character, of coarse, brutal and violent passions, ungovernable temper, intemperate habits and greatly addicted to the use of intoxicating liquors, and that since their said marriage as aforesaid the said plaintiff has treated this defendant in a cruel, brutal and inhuman manner and has been guilty of extreme cruelty towards this defendant, frequently striking and beating her and frequently addressing to her the most opprobrious epithets, foul language, and threats of personal violence, and that the said plaintiff's entire course of conduct towards the *plaintiff*, with rare intervals, has been since within two or three months after their said marriage as aforesaid uniformly brutal and abusive, so that it became entirely unsafe for this defendant to live with said plaintiff as hereinafter more fully set forth.

8. That about the first of September, 1888, at the city of Boston, Massachusetts, where they then resided, as defendant was preparing to go out driving, the plaintiff seized her parasol and struck this defendant a violent blow across the stomach, breaking the parasol, at the same time cursing this defendant and using foul, profane and abusive language to her, that at said time this defendant was in a delicate state of health, it being about two weeks prior to the birth of their said child.

9. That after the birth of their said child the said plaintiff continued to pursue a systematic course of abuse of this defendant refusing to allow her to call upon her friends and acquaintances and would not permit her to see them or receive calls from them, and frequently locked this defendant out of her room, took away her clothing, and addressed to her the most obscene, profane, violent and abusive language; and that the said plaintiff continued this course of conduct and his cruel, brutal and inhuman treatment of this defendant until the death of their said child, which occurred on January 13th, 1889.

10. That about two weeks after the death of their said child as aforesaid, the said plaintiff and this defendant went on a trip to Europe, and that during all of the time they were away on said trip the plaintiff drank to excess frequently becoming drunk, boisterous and disorderly, and treated this defendant in such a cruel, brutal, inhuman and outrageous manner that she became afraid for her life and was frequently obliged to call upon strangers for protection from the acts of violence of her said husband.

11. That at the city of Nice, in France, the plaintiff became intoxicated and abused this defendant, repeatedly striking her in the face and otherwise treated her in a cruel and inhuman manner, to such an extent as to attract the attention of the proprietor and guests at

the hotel where they were stopping, and refused to discontinue his ill treatment and abuse of this defendant until he was obliged to do so through the interference of the proprietor.

12. That while they were stopping at a hotel in the city of Milan the said plaintiff put this defendant out of her room, kept her clothes away from her, addressed foul, profane and abusive language to her, and otherwise treated her in a cruel, brutal and inhuman manner, so that this defendant was obliged to appeal to the proprietor of the hotel for protection from the cruelty and abuse of the plaintiff.

13. That at Shaffhausen, in Switzerland, the said plaintiff struck and cursed this defendant and otherwise abused her and acted in a brutal and disorderly manner, so that the guests at the hotel where they were stopping made complaint of his conduct and threatened to leave the hotel if he was allowed to remain, and on account of his conduct he was requested by the proprietor to leave the hotel; and that such course of conduct continued during their entire stay in Europe.

14. That after the return of plaintiff and defendant from Europe the said plaintiff continued his ill treatment and abuse of the defendant until she became sick and was obliged to leave home and go to the city of Washington for medical treatment where she remained for a period of about six weeks. That after her return home the plaintiff continued his ill treatment and abuse of her, frequently striking and cursing her and using foul and indecent language to her, and that said plaintiff would remain away from home at night until nearly morning when he would come home in an intoxicated condition and would strike, curse and otherwise abuse this defendant, and during said time refused and neglected to provide for her the necessaries of life although he had the ability so to do.

15. That by reason of the conduct on the part of the plaintiff toward this defendant as hereinbefore set forth and of his ill treatment and abuse of this defendant as aforesaid and his total neglect of her, this defendant's health again became seriously impaired and undermined, and that the plaintiff's cruel and inhuman treatment
61 of this defendant and his brutal and outrageous conduct toward her rendered it unsafe for this defendant to live longer with the said plaintiff or remain within reach of his violence, and that about the first of May, 1890, she was obliged to leave the house of said plaintiff and go to her friends and that since said time she has not dared to return to said plaintiff or to live with him.

16. That since this defendant was obliged to leave the plaintiff as aforesaid and live separate and apart from him, which was without any fault or omission of duty on her part but was caused solely by the continued acts of violence and brutal conduct of the plaintiff toward this defendant which rendered it dangerous and unsafe for her to longer live with him or near him, the said plaintiff has employed detectives and other persons to constantly follow this defendant for the express purpose of annoying and harrassing her and of humiliating her before her friends and the public, and by such means to cast reflections upon her character.

17. That by reason of the conduct on the part of the plaintiff

toward this defendant as hereinbefore set forth and of his cruel, brutal and inhuman treatment of her as aforesaid, and of his neglect and failure to provide, maintain and care for this defendant as aforesaid, this defendant has suffered grievous bodily injury and grievous mental suffering, to such an extent that her health has become seriously impaired and undermined.

18. And this defendant further answering says that she is informed and believes and charges the truth to be that the said defendant, disregarding the solemnity of the marriage vow, hath, since the marriage of this defendant with the plaintiff as aforesaid and especially during the years 1889, 1890 and 1891, committed adultery at divers times, with various women whose names are to this defendant unknown, at divers places in the city of Boston in the State of Massachusetts; that about the first day of April, 1890, the plaintiff informed this defendant that he was going to the city of New York to be gone about a week, and thereupon left their house in Boston where they were then residing and was absent for about one week, this plaintiff supposing at the time that he was in the city of New York, but that this defendant has ascertained, since the time she was obliged to leave the plaintiff as hereinbefore set forth, that the said plaintiff spent the entire time in different houses of prostitution in the city of Boston aforesaid consorting with lewd women and prostitutes; and this defendant says that she is informed and believes and charges the truth to be that at different times during said week the plaintiff committed adultery with various women whose names are to this defendant unknown at different places and houses of prostitution in said city of Boston.

19. This defendant further says that she is informed and believes and charges the truth to be that in the year of 1890 and soon after she had returned from the city of Washington where she had been for medical treatment as aforesaid, the plaintiff spent a large portion of his time in different houses of prostitution in said city of
62 Boston in company and consorting with lewd women and prostitutes and that during said time at divers times and at different places and houses of prostitution the exact location of which are to this defendant unknown the said plaintiff committed adultery with various women whose names are to this defendant unknown.

20. This defendant further alleges that she was wholly and entirely ignorant of the commission of the aforesaid acts of adultery by said plaintiff, or any of them, until after she was obliged to leave the house of the plaintiff as hereinbefore set forth, and that she has not cohabited with the plaintiff since the discovery thereof, and that such adultery was committed by said plaintiff without the previous knowledge, consent, connivance, privity or procurement of this defendant.

21. This defendant further answering says that the plaintiff, disregarding his marriage vow and his duties as a husband toward this defendant, has been for more than three years last past, guilty of habitual intemperance, and that during said time the plaintiff has been almost constantly under the influence of intoxicating

liquors and has used intoxicating liquors to such an extent as to disqualify him during almost the entire time from properly attending to his business, and that by reason of the same this defendant has suffered great mental anguish.

22. This defendant further answering says, that for about six months prior to the time when she was obliged to leave the house of the plaintiff as hereinbefore set forth the said plaintiff entirely neglected to furnish and provide for this defendant the necessaries of life and did not furnish her with money with which to procure the same, and did not furnish her with suitable support and maintenance, although he had the ability so to do, he, during all of said time, being in receipt of a large income and having at his disposal large sums of money and abundant means for the support and maintenance of himself and family; and that during all of the time since this defendant was obliged to leave the house of the plaintiff and live separate and apart from him as hereinbefore set forth the plaintiff has utterly failed and neglected to care for or provide for this defendant, and has refused to provide for her support and maintenance, although he had abundant means so to do; and that this defendant has been and is now entirely dependent upon her own labor and the charity of her friends for her support, having no property of her own from which she receives any income.

23. This defendant further alleges that the plaintiff is a man of large means, in receipt of a large income which according to the best knowledge and belief of this defendant, exceeds the sum of ten thousand dollars a year.

24. This defendant further alleges that she has no money or property of any kind or description with which to pay the expenses of this suit, employ counsel or upon which to support herself during the pendency of this action; that it will require the testimony of a large number of witnesses residing at different places in
63 Europe, in the city of Boston, New York, and Washington, and that the testimony of said witnesses will have to be principally taken by depositions and that the procuring of said testimony and the preparation and trial of said cause will be attended with large expense.

25. This defendant further answering alleges that by reason of the facts hereinbefore set forth the plaintiff in this action is not entitled to the relief prayed for in the complaint in this action, and that this court has no jurisdiction to grant the same.

Wherefore this defendant demands judgment against the plaintiff:

1. For a suitable and proper sum to be paid by the plaintiff, to this defendant under the order and direction of this court for her counsel fees, the expenses of this suit, and for her support and maintenance during the pendency of this action.

2. That the plaintiff's complaint be dismissed with costs.

3. That this defendant have such other, further or different relief as she may be entitled to upon the trial of this action.

KEITH & BATES,
Attorneys for Defendant.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

H. H. Keith, being duly sworn, says he is one of the attorneys for the defendant in the within-entitled action; that he has read the annexed and foregoing answer and knows the contents thereof and that the same is true to the best knowledge, information and belief of this deponent; that the reason that this verification is not made by the defendant herein is that said defendant does not reside in and is not now within said Minnehaha county where the defendant's said attorney resides.

H. H. KEITH.

Subscribed and sworn to before me this 23rd day of February, 1892.

R. H. WARREN,
[SEAL.] *Notary Public, South Dakota.*

I admit due and personal service of the within answer upon me made at Sioux Falls, on this 1st day of March, 1892.

W. H. STODDARD,
Attorney for Plff.

64 STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs. }
KATE H. ANDREWS, Defendant. }

CITY OF WASHINGTON, } ss:
District of Columbia, }

Kate H. Andrews being first duly sworn deposes and says: that she is the defendant in the above-entitled action, and is the wife of the plaintiff herein. That a short time prior to January, 1892, this deponent was served in the city of Washington, D. C., with a copy of the summons and complaint in this action. That said complaint among other things alleged that the plaintiff was a *bona fide* resident of the State of South Dakota and had been for ninety days prior to the commencement of said action; and further alleged that this deponent had deserted and abandoned the plaintiff and prayed that the marriage relations existing between the plaintiff and this deponent be dissolved. That this defendant very shortly thereafter employed the firm of Keith & Bates, attorneys-at-law residing at the city of Sioux Falls, State of South Dakota, to appear for her and defend said action, and that this deponent shortly thereafter prepared a statement of the facts constituting her defense and caused the same to be sent to said firm of Keith & Bates to aid them in preparing her said answer in this action. That said answer was afterwards prepared and verified by H. H. Keith one of said firm of Keith & Bates, for the reason, as this deponent is informed by

her said attorneys and verily believes, that there was not sufficient time to mail said answer to this deponent for verification before the time for service of the same would expire. That afterwards said firm of Keith & Bates mailed said answer so drawn and verified as aforesaid to this deponent. That this deponent has read said answer and knows the contents thereof and that all of the allegations of said answer are true to the knowledge of this deponent, except as to matters therein stated on information and belief, and as to those matters she believes it to be true; and this deponent here refers to said answer served in this action and makes the same a part of this her affidavit in all respects the same and with the same force and effect as if the said answer were set forth verbatim herein.

This deponent further says that she has no separate estate or property of any kind whatever and is entirely dependent upon her relatives and friends for support. That this deponent has never received a dollar from the plaintiff in this action since she was obliged to leave him on the 7th day of May, 1890, as set forth in her answer in this action. And this deponent further states that the said plaintiff has not furnished her with any means whatever of any kind towards her maintenance or support or otherwise, since the said 7th day of May, 1890, and that since said time this deponent has been without any money or means of support except what has been given her by friends and relatives for support and is now absolutely without means and has no way to procure any means except through the kindness of relatives and friends as aforesaid. That this deponent has neither money nor means to support herself, or to pay counsel to defend this action.

This deponent further says that she desires to make her defense to said action upon the trial thereof, and that in order to enable this deponent to make such defense she will have to procure the testimony of a large number of witnesses, some in France, some in Switzerland, some in Germany, and a number in the city of Boston, Massachusetts, and other places all of which testimony is material to her defense in this action as she is advised by her said counsel after having made a full and complete statement of the facts which she expects to prove by each of said witnesses, and verily believes to be true.

This deponent further says that during the time the plaintiff and this deponent lived together as man and wife the plaintiff had unlimited means, spent large sums of money for himself and received a large income, and that the said plaintiff has at the present time an income of not less than six thousand dollars a year, and has sufficient means and resources to provide for and take care of this deponent and not allow her to be thrust on the charity of her friends and relatives for support; that the said plaintiff has means to provide any sum which the court may award in this action for the support and maintenance of this deponent, as well as for counsel fees and necessary expenses to enable her to carry on and defend this action; that the sum of one thousand dollars will be a reasonable

sum to be allowed by the court to this deponent for counsel fees and expenses of testimony in defending this action.

This deponent therefore prays an order of this court granting her a sufficient sum for her maintenance and support during the pendency of this action, and also such further sum as may be necessary to pay her counsel fees and to procure testimony and do other necessary things to enable her to make her defense to this action; and for such other and further relief in the premises as to the court may seem meet.

KATE H. ANDREWS.

Subscribed and sworn to before me this 29th day of March, 1892.

GOODWIN Y. ATLER,
Notary Public.

[SEAL.]

66 STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

H. H. Keith being first duly sworn deposes and says that he is one of the attorneys for the defendant in the above-entitled action. That from the statement of the case made to deponent by the defendant in this action this deponent verily believes that the said defendant has a good and substantial defense to the cause of action as set forth in the complaint in this action, upon the merits. That this deponent is conversant with the facts set forth in the defendant's answer herein. That all the allegations set forth in the defendant's said answer are necessary to be proved upon the trial of this action in order for the defendant to establish her defense to said action. That this deponent is advised by the said defendant that the witnesses by whom she can prove the allegations of her said answer reside in France and Germany and in the city of Boston, Massachusetts and in other places in the United States. That said defendant has stated to this deponent what she expects to prove by each of said witnesses residing at the various places set forth in order to establish her defense and this deponent has advised the said defendant that it is necessary and material to examine said witnesses. That in order to examine said witnesses and to procure their testimony their depositions will necessarily have to be taken and it will necessarily involve a large expense in taking the same in foreign countries and in the United States.

This deponent further says that he is informed by the said defendant that she has no money or property of any kind to pay for the procuring of said testimony and taking the depositions of said

witnesses, or to make any preparation for the trial of said action that this deponent believes it will require at least one thousand dollars to obtain the necessary testimony and to make the necessary preparations for the trial of this action so that the same can be properly tried upon the merits. This deponent further says that the plaintiff in this action is now in the city of Sioux Falls and has been here for some time; that this deponent is informed and believes and charges the truth to be that the said plaintiff during the time he has been in Sioux Falls has spent large sums of money and is apparently a man of means; that he has stated to various persons in the city of Sioux Falls that he owned large property in Boston, Mass., and has boasted of his wealth, and that the amount of money at his command is limited only by his disposition to spend the same.

This defendant further says that terms have been imposed upon the defendant in this action upon the service of her answer
67 herein, the same being ten dollars, which this deponent paid out of his own pocket, and has not been reimbursed for the same by the defendant or any other person. That this deponent is credibly informed by the friends of said defendant that she has no money or property or means of any kind with which to procure the testimony in this case or to properly prepare this action for trial, and that she is entirely dependent upon her friends for support.

H. H. KEITH.

Subscribed and sworn to before me this 2nd day of April, 1892.

[SEAL.]

R. H. WARREN,
Notary Public, S. D.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

MINNEHAHA COUNTY, ss:

Charles S. Andrews being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the affidavits of H. H. Keith and Kate H. Andrews and knows the contents thereof; that the statements therein made to the effect that deponent has property or an income of any amount are absolutely and unqualifiedly false. That deponent has never at any time stated to any person in the State of South Dakota, or elswhere, that he had an income, or property either in South Dakota or the State of Massachusetts; and deponent alleges the fact to be that he has no income whatever of his own and no property whatever of his own. That the money which is required to pay living expenses of deponent is wholly received from deponent's father, Mr. Charles H. Andrews, of Boston, Mass. That at the time of deponent's marriage to defendant, Kate H. Andrews, deponent was the owner of the residence

property known as number 381 Commonwealth avenue, in the of Boston, which was worth and of the value of thirty-eight sand dollars and upon which said property there was an in brance of thirty thousand dollars; that deponent's father, Charles H. Andrews, furnished said house complete at a cost of a twenty thousand dollars, and deponent and defendant occupied house as a residence. That a few days after the marriage of nent to defendant, said deponent conveyed all of his right, titl interest in and to said property known as number 381 Commonw avenue, aforesaid, to said Kate H. Andrews, and said property the property then or since owned by deponent, and since the ti the desertion of this deponent by said defendant in May, 1890, defendant has received the rental of said property, which has of the value of forty-five hundred dollars per annum.

That in the month of May, 1890, said Kate H. And
68 instituted proceedings in the probate court of the coun Suffolk, State of Massachusetts, against deponent for the pose of obtaining a separate maintenance from deponent. That proceedings were thereafter had in said action that said probate ordered and adjudged that said deponent, Charles S. Andrews, the defendant, Kate H. Andrews, the sum of one hundred dollar month for her support, whereupon deponent feeling aggrieved by judgment and decree of said probate court, appealed to the sup court of the city of Boston, State of Massachusetts, from said judgm and while said appeal was pending in said superior court, it stipulated and agreed by and between the attorneys for Kat Andrews and the attorney for deponent in said proceeding th consideration of the conveyance by this deponent to said Kat Andrews — all his interest as tenant by curtesy in and to the prop known as number 381 Commonwealth avenue, in the city of Bo and of all of deponent's right, title and interest in the furnitu said building or residence contained, then that the appeal of deponent from the judgment rendered in the probate court sh be sustained and said judgment of the probate court vacated an aside. That this deponent in pursuance of said agreement conveyed his interest in the land and property known as nu 381 Commonwealth avenue to Marcus Morton, Jr., at the reque said Kate H. Andrews and for her benefit; and also the furni and chattels in said house, this being the only way under the of the State of Massachusetts that deponent as the husband of H. Andrews could convey his property to her. That this con ance was made to Marcus Morton, Jr., at the request of Kate H. drews and her attorneys and said Kate H. Andrews has now exclusive ownership and control of said property, which is all property, either real or personal which this deponent has owne any time since his marriage to the defendant.

That the truth of this affidavit so far as the proceedings in probate and superior courts of Boston are concerned, will more f and at large appear by an exemplified copy of the said proceedi hereby referred to and made a part of this affidavit.

Deponent further deposes and says that said Kate H. Andrews

no testimony whatever that she can obtain in Europe as to any alleged misconduct on the part of this deponent towards said defendant, as alleged in defendant's answer in this action, which deponent has heard read and hereby declares to be false in every particular so far as it seeks to charge this deponent with the offenses therein alleged. That deponent can name no person on the continent of Europe or in Great Britain who ever saw or heard any conduct or speech on the part of this deponent as charged in defendant's answer.

And deponent further says that the large sums of money spent by the defendant as the wife of this deponent during their married life, and the whole thereof, were given to this deponent by his father, Charles H. Andrews, and upon the refusal of deponent's father to contribute to the extravagance of said defendant, said defendant deserted said deponent as alleged in his complaint in this action.

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That it was agreed between the attorneys of the deponent and the said defendant at the time of the sustaining of deponent's appeal in the superior court, in Boston, that the conveyance of the property hereinbefore mentioned, should be in full satisfaction of all demands upon this defendant for support by the said defendant.

CHARLES S. ANDREWS.

Subscribed and sworn to before me this 8th day of April, 1892.

FRANK R. SIDWELL,

[SEAL.] *Notary Public, Minnehaha Co., So. Dak.*

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, }

Personally appeared Charles H. Andrews who being first duly sworn doth depose and say:

That he is the father of the plaintiff in the above-entitled action, and that he is familiar with all the facts contained therewith; that he has read the complaint herein, and has also read the answer sworn to by H. H. Keith in this action.

That on or about the 7th day of May, A. D. 1890, this defendant wilfully and without any cause whatever deserted this plaintiff in the city of Boston and the State of Massachusetts, where the plaintiff and defendant then resided; that at the time of the said desertion, plaintiff and defendant were living in a house at No. 381 Commonwealth avenue in the city of Boston which this deponent had purchased for his son, this plaintiff; that after the marriage of his son with the said defendant, and after the purchase of the said

house, this deponent furnished the said house throughout at an expense of about $20,000; that he paid for the said house the sum of $38,000, $8,000 thereof in cash and the balance secured by a mortgage on the said property; that the actual value of the said house at the present time is at least $45,000, and that the house with the furniture therein is worth at the least calculation $58,000.

That subsequent to May 7th, A. D. 1890, the defendant after her said desertion of the plaintiff, as aforesaid, commenced pro-
70 ceedings in the probate court in the city of Boston against this plaintiff, asking for an order compell*ed* him to contribute to her maintenance and support, and that thereafter and on or about the 6th day of October, A. D. 1890, she at her own instance withdrew said proceedings, and at said time this plaintiff and this deponent caused to be turned over to this defendant, the house and furniture at No. 381 Commonwealth avenue, aforesaid, subject to the mortgage of $30,000 thereon which the defendant assumed and agreed to pay, and in consideration thereof, it was then and there agreed by and between the plaintiff and defendant, which said agreement was reduced to writing, that this defendant should withdraw the proceedings aforesaid, which would release this plaintiff from all liability for her support, release him from all obligations which she had incurred since April 28th, A. D. 1890, and that also, in consideration thereof she would forever refrain from making any further demand or claim upon this plaintiff for her support or maintenance whatever, and that at the time that said agreement was made this plaintiff turned over to this defendant and this defendant received, the house and furniture aforesaid; that every dollar paid for the said house and furniture was paid by this deponent, and that the title to the said house was placed in the name of the defendant for the reason that at said time the plaintiff was not of age and said house and furniture was purchased by this deponent for a home for plaintiff and defendant and that defendant never in any way contributed a dollar towards the payment of the said house and furniture, aforesaid; that at the time of the making of the agreement, aforesaid, plaintiff still retained his curtesy interest in said house and that in consideration of his transferring to defendant his curtesy interest as aforesaid and of giving to the said defendant a bill of sale of the furniture, all of which the defendant at time received from plaintiff and this deponent, the plaintiff entered into the agreement aforesaid; that defendant has received at the least calculation the sum of $20,000 from this plaintiff by means of the house and furniture aforesaid since the 7th day of May, A. D. 1890, and that she has received all the money and property that the plaintiff was at that time possessed of, he having expended all his patrimony in maintaining the house, aforesaid, and the family of this defendant and that to the knowledge of this deponent the said Charles S. Andrews has no property of any kind whatever, either in his possession or in expectancy.

That this deponent was present at the time of the examination of this defendant in the proceedings before the probate court in the city of Boston and State of Massachusetts, aforesaid, and that upon

the said examination this deponent heard this defendant, the said Kate H. Andrews, testify that of her own knowledge, she knew that this plaintiff Charles S. Andrews had no property or means of support and that every dollar that she had received, or would receive, would come direct from Charles H. Andrews, this deponent; that to the knowledge of this deponent the said Charles S. Andrews has no means of support whatever, and that the allegation in the affidavit of H. H. Keith and in the affidavit of Kate H. Andrews, stating that this plaintiff is a man of ample means and has an
71 income of $6,000 is false and untrue in every particular and is so known to be by the defendant Kate H. Andrews.

Deponent further says that the said Charles S. Andrews is entirely dependent upon him for support and that since his marriage with this defendant, he has to the knowledge of this deponent spent upon this defendant in various ways more than $30,000 and that every dollar that the said Charles S. Andrews had has been expended by him, and that this defendant at the time of her separation took with her silverware and jewels which had been purchased by the said Charles S. Andrews of the value of at least $12,000, and that the said Kate H. Andrews has had and received all of the said money since she married this plaintiff, and that at the time of her marriage she had no property whatever of any kind.

Deponent further says that he has furnished and sent to this plaintiff all the money that he has had since he came to Dakota and that the whole amount expended by the said Charles S. Andrews this plaintiff, is known to this deponent and the affidavit of H. H. Keith that plaintiff during the time he has been in Sioux Falls has spent large sums of money and is apparently a man of means, is false and known by the said Keith to be false.

Deponent further says that he knows of a fact that the said Charles S. Andrews is indebted in the city of Boston in the sum of at least $23,000 to the personal knowledge of this deponent.

CHAS. H. ANDREWS.

Subscribed and sworn to before me this eighth day of April, A. D. 1892.

FRANCIS PEABODY, JR.,
Notary Public.

[SEAL.]

Commission expires Nov. 24th, 1893.

STATE OF SOUTH DAKOTA, }
County of Minnehaha, } ss:

In the Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

COMMONWEALTH OF MASSACHUSETTS, }
County of Suffolk, } ss:

Blanche Andrews being duly sworn deposes and says: That sh
is the sister of the plaintiff in the above-entitled action; that sh
well knows the defendant Kate H. Andrews; was with the plaint
and defendant at Schaffhausen in Switzerland at the time mention
in the defendant's answer, and that she was with plaintiff an
72 defendant in the city of Nice in France at the time mention
in defendant's answer, and at the time that plaintiff and d
fendant were traveling in Europe and was present with the plaint
and defendant nearly the whole of said trip; that she well kno
that this defendant cannot, or at least could not at the time me
tioned, speak a word of any language excepting the English languag
and that the people at the hotel where they stopped could none
them speak English; that at the times mentioned there was nothi
transpired as alleged in the defendant's answer; that plaintiff d
not strike or curse this defendant or abuse her in any way, and th
at neither of the places aforesaid was the plaintiff guilty of any cru
or inhuman treatment of this defendant, and that to the knowled
of this deponent there are no witnesses in France, Germany, Swi
erland or any European country that know anything in relation
the facts in this case, or have any knowledge thereof whatever, an
that the statement in the defendant's affidavit that she will requi
witnesses from the continent of Europe, is without foundation and
untrue, and that defendant's sister was present with her during th
whole of the time in which she was traveling in said countries, an
knows all that transpired.

BLANCHE ANDREWS.

Subscribed and sworn to before me this eighth day of April, A.
1892.

FRANCIS PEABODY, JR.,
[SEAL.] *Notary Public.*

Commission expires Nov'r 24th, 1893.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, }

George H. Andrews, being duly sworn deposes and says: That he is the brother of the plaintiff in the above-entitled action; that he well knows the defendant Kate H. Andrews, was with the plaintiff and defendant at Schaffhausen in Switzerland at the time mentioned in defendant's answer, and that he was with plaintiff and defendant in the city of Nice in France at the time mentioned in defendant's answer, and at the time that plaintiff and defendant were traveling in Europe and was present with the plaintiff and defendant nearly the whole of said trip; that he well knows this defendant cannot, or at least could not at the times mentioned, speak a word of any
73 language excepting the English language, and that the people at the hotel where they stopped could none of them speak English; that at the times mentioned there was nothing transpired as alleged in the defendant's answer; that plaintiff did not strike or curse this defendant or abuse her in any way, and that at neither of the places aforesaid was the plaintiff guilty of any cruel or inhuman treatment of this defendant, and that to the knowledge of this deponent there are no witnesses in France, Germany, Switzerland or any European country that know anything in relation to the facts in this case, or have any knowledge thereof whatever, and that the statement in the defendant's affidavit that she will require witnesses from the continent of Europe, is without foundation and is untrue, and that defendant's sister was present with her during the whole of the time in which she was traveling in said countries and knows all that transpired.

G. H. ANDREWS.

Subscribed and sworn to before me this eighth day of April, A. D. 1892.

FRANCIS PEABODY, JR.,
Notary Public.

[SEAL.]

Commission expires Nov'r 24th, 1893.

SECOND JUDICIAL CIRCUIT, }
State of South Dakota. }

In Circuit Court, County of Minnehaha.

CHARLES S. ANDREWS }
vs. } Order.
KATE H. ANDREWS. }

This cause coming on to be heard upon the motion of defendant for temporary support, expenses and attorneys' fees, and the same being supported by the affidavits of said defendant and H. H. Keith, her counsel, and opposed by the affidavits of C. S. Andrews, C. H. Andrews, G. H. Andrews and Blanche Andrews, and the respective attorneys, H. H. Keith, Esq., arguing for, and John E. Carland, Esq., and W. H. Stoddard, Esq., in opposition, and the court having duly considered the same and being advised does hereby order,

First. That the motion for support be denied for the reason that it appears that the defendant is not in need thereof, she having fully settled with the plaintiff and released him for a valuable consideration therefor.

Second. That the plaintiff pay to the defendant or her attorneys the sum of three hundred dollars ($300) to defray expenses in obtaining evidence and preparing to try the issues of this case.

Third. That the plaintiff pay to the defendant's attorneys, Messrs. Keith & Bates, the sum of one hundred and fifty dollars ($150) as counsel of att'ys' fees.

74 Fourth. That the said $300 and $150 be paid as directed within fifteen days from the date of the service of this order (which is ordered served forthwith).

Fifth. That the foregoing sums are not to be considered or construed as being in full or final, but additional sums may be allowed by the court or referee as the exigencies of the case may require.

By the court:

FRANK R. AIKENS, *Judge.*

BOSTON, *April* 22, 1890.

Received of Charles S. Andrews three hundred dollars am't ordered to be paid to me by So. Dakota court in Andrews *v.* Andrews.

$300. KATHERINE H. ANDREWS,
By her attorney, M. F. DICKINSON, JR.

STATE OF SOUTH DAKOTA, }
County of Minnehaha, } *ss:*

In the Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs. }
KATE H. ANDREWS, Defendant, }

Received April 25th, 1892, of Charles S. Andrews by the hand of W. H. Stoddard, the sum of one hundred and fifty ($150) dollars,

being in full for attorneys' fees as provided in the order of the court made by the Honorable Frank R. Aikens in the above-entitled action.

KEITH & BATES,
Defendant's Attorneys.

Filed this 6 day of May, 1892.
ALBION THORNE,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In the Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

Please take notice: That we, the undersigned attorneys for
75 Kate H. Andrews, the defendant in the above-entitled action, do hereby withdraw our appearance for the said defendant, and withdraw our appearance in the said action.

Dated May 5th, A. D. 1892.

KEITH & BATES,
Defendant's Attorneys.

To W. H. Stoddard and John E. Carland, plaintiff's attorneys.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

This action having been duly commenced by personal service of the summons and complaint upon the defendant, and said defendant having duly appeared and answered by Keith & Bates, her attorneys, and said action having been at issue and regularly upon the calendar for the April, A. D. 1892, term of this court, and having been regularly reached in its order, the plaintiff appearing upon the trial in person and by William H. Stoddard and John E. Carland, his attorneys, and the defendant failing to appear upon the trial, aforesaid, and the court having heard the allegations and proofs of said plaintiff, and having considered the same, now upon the complaint and answer and all the papers and proceedings herein the court makes the following findings of fact:

1st. That the plaintiff, Charles S. Andrews, is, and was, for more than ninety days next preceding the commencement of this action, a resident in, and of, the State of South Dakota, in good faith.

2nd. That on the 13th day of April, A. D. 1887, at the city of Boston, in the State of Massachusetts, the plaintiff, Charles S. An-

drews, and the defendant, Kate H. Andrews, were duly married, and were at the time of the commencement of this action, husband and wife.

3rd. That on the first day of May, A. D. 1889, the defendant disregarding the solemnity of her marriage vow, wilfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues so to wilfully and without cause desert and abandon said plaintiff, and to live separate and apart from him without any sufficient cause or any reason and against his will and without his consent with intent him to desert.

4th. That the said wilful desertion so found as aforesaid, was committed by the defendant without the procurement, con-
76 nivance, or collusion of the plaintiff, and without any previous agreement or understanding between the plaintiff and defendant, and without any fault on his part.

5th. That all of the charges and allegations made in the plaintiff's complaint are fully sustained by the evidence of the plaintiff and are not contravened, rebutted or disproved by the evidence of the defendant, and that all of the allegations of the plaintiff are true.

6th. That there are no children born of the marriage between the plaintiff and defendant now living.

I find as conclusions of law: That the plaintiff is entitled to the relief demanded in the complaint, and to a judgment and decree of this court dissolving the marriage heretofore and now existing between the plaintiff and the defendant, and freeing the plaintiff, Charles S. Andrews, and the defendant, Kate H. Andrews, from the bonds of the said marriage and all the obligations, rights and privileges thereof.

Dated at Sioux Falls, this 6th day of May, A. D. 1892.

By the court:

FRANK R. AIKENS, *Judge.*

Filed this 6 day of May, 1892.

ALBION THORNE,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

In Circuit Court, Second Judicial Circuit.

CHARLES S. ANDREWS, Plaintiff, }
vs.
KATE H. ANDREWS, Defendant. }

This action having been duly commenced by personal service of the summons and complaint upon the defendant, and said defendant having duly appeared and answered by Keith & Bates, her attorneys, and said action having been at issue and regularly upon the calendar for the April, A. D. 1892, term of this court, and having been regularly reached in its order, the plaintiff appearing upon the trial in person and by William H. Stoddard and John E. Carland, his

attorneys, and the defendant failing to appear upon the trial, aforesaid and the court having heard the allegations and proofs of said plaintiff, and having considered the same, and having made and filed findings of fact and conclusions of law herein, and being fully advised in the premises:

Now on motion of William H. Stoddard and John E. Carland, attorneys for plaintiff:

It is ordered, adjudged and decreed that the marriage now and heretofore existing between the plaintiff, Charles S. Andrews, and the defendant, Kate H. Andrews, be dissolved, and the same hereby is dissolved accordingly, and the parties hereto are, and each 77 of them is freed from the bonds of said marriage and all the rights, privileges and obligations thereof, the same as if the said marriage had never been contracted, in accordance with and pursuant to the statute in such case made and provided.

Done in open court at the city of Sioux Falls in said circuit this 6th day of May, A. D. 1892.

By the court:

FRANK R. AIKENS, *Judge.*

Attest: ALBION THORNE, *Clerk,*
[SEAL.] By H. B. CARLETON, *Deputy.*

Filed this 6 day of May, 1892.
ALBION THORNE,
Clerk Circuit Court.

EXHIBIT 5, W. R.

HERALD OFFICE, BOSTON, MASS., *June* 24, 1893.

This certifies that C. S. Andrews is an authorized reporter and correspondent for the Boston Herald, at large. Unless previously revoked, this certificate expires on the 31st day of Dec. eighteen hundred and ninety-three at which time it must be returned for exchange.

THE BOSTON HERALD COMPANY,
By FRED E. WHITING, *Clerk.*

No. 56.

EXHIBIT 6, W. R.

BOSTON, *November* 18*th*, 1890.

It is agreed between R. M. Morse, Jr., Esq., counsel for Mrs. C. S. Andrews and F. Peabody Jr. as counsel for C. S. Andrews as follows:

(I.) Mrs. Andrews is to allow her petition in the probate court to be dismissed.

(II.) She is to pay all bills contracted by her since April 28th, 1890, and to agree that she will not make or attempt to make C. S. Andrews liable for any debts hereafter.

(III.) She is to return any of her husband's personal effects o clothing that she may have.

(I.) Mr. Andrews is to allow Mrs. Andrews to have all th
78 furniture belonging in house 381 Commonwealth avenue but Mr. Andrews is to have his books, papers and camera.

(II.) He is to surrender his right of courtesy in premises 381 Com monwealth avenue. Also all property of Mrs. Andrews now in hi possession. Each party to pay his or her own costs.

The two old paintings "Lying in Wait" and "The Last of th Huguenots" are to be returned to Mr. C. H. Andrews to whom the belong.

R. M. M., JR.
F. P., JR.

EXHIBIT 7, W. R.

NEW YORK, *April 22nd*, 1892.

I, Kate H. Andrews, authorize M. F. Dickinson, Jr., my attorne to settle with my husband, Charles S. Andrews as follows:

First. In addition to the $300 paid by Charles H. Andrews yes terday on order of the South Dakota court and a further sum of $15 sent by Charles H. Andrews to my counsel in Sioux Falls Dakota my husband is to pay me the sum of $2,050 when the divorce fo dissertion is obtained against me in the South Dakota court.

Second. Charles H. Andrews is to guarantee the payment of th said $2,050.

Third. M. F. Dickinson Jr. is authorized to execute in my nam the papers necessary to carry out the foregoing agreement.

Fourth. Upon execution of such papers, M. F. Dickinson Jr. i authorized in my name to consent to the granting of divorce for dis sertion in the South Dakota court.

KATE H. ANDREWS.

Witness:
R. C. RATHBONE.

EXHIBIT 9, W. R.

WASHINGTON, D. C.

DEAR MR. ANDREWS: I must be pardoned for taking this liberty in addressing you. Perhaps you will consider it unwarrantable but circumstances over which I have no control urge me to do so, and make a personal appeal to your generosity, as well as humanity. I have made many attempts to help myself pecuniarily speaking— as it was and is a mortification and mental distress to come back upon my father, for my support. He is an old man, who has only his half pay during his lifetime, which ceases entirely at his death, and as you can see, can have nothing
to leave for his children, which must be a great sorrow
79 to him, as it naturally would any parent who cares for his own. At the time of the divorce between your son Charles & myself, I allowed him to obtain it by withdrawing my own defence.

Of course you paid the lawyers' bills, but I personally seemed to be left out and to the mercy of the world. This does not seem fair to a woman who was a good wife to your son, and who became the mother of his child, amid pain, sickness and almost death, to say nothing of other physical ills here and in Europe. It would seem as if I was entitled to some consideration, and should at least have some proper support. You would say I have the house on Commonwealth avenue. So I have but you can see that it is a perfect elephant upon my hands. It was heavily mortgaged as you know and was a handicap to me from the start. It requires money to keep it in order, and I have been unfortunate with tenants, who have either left on non-payment or have swindled me out of the rental. I have not money to carry this house, in fact, I cannot. Perhaps I might suggest or ask you to take it back and give me its equivalent, or some stated sum which would be more of a reliance than the house, itself, as it now stands, under the existing circumstances. You will say probably that I married your son for money. I did not. I did not consider it at all. I was very much attached to him and after our marriage I did all I could for him, in every way, and when I found that he ceased to care for me it made me dissatisfied, and hence the separation and the subsequent divorce obtained by him. Mr. Andrews, I do not wish to distress you or appear mercenary, but I feel I am entitled to what I ask for, that you should take or buy back this house in Boston. I have had untold unhappiness over it, and suffered a great deal in mind. I have sold what jewelry I had to get money enough to keep it in order, and to pay my expenses, attendant on going or coming from Washington to Boston. I know all that you have suffered with your trials, and above all in the loss of your only and idolized daughter, and I beg of you by her memory to do something for me. If she had lived and had been placed as I am, treated unfairly and not with justice, it would break your heart, perhaps more so than had she died, for sometimes living troubles are harder to bear than to bury a loved one. Perhaps could you put yourself in my father's place, he is fast passing on and feels my position most keenly, it has aged him, it wears upon him, and he feels his utter helplessness to leave me protected by such environments as daughters should have. It would lighten his burden and make it less hard to die could he know that I had a competency even a modest one, or the assurance that I had something to depend upon. May I ask you to dwell upon these facts, and let them appeal to your heart and generosity, which has ever been so lavish to your own children, and which has never failed them. I am willing to work to do anything that I am fitted for, and would not hesitate to accept any proper and respectable position, whereby I could better my condition, in fact, I have made the greatest efforts for the past three years, but am still unsuccessful. I make this appeal to you, Mr. Andrews, because it seems right and just that I should, and if you will assist me, you will have my life-long gratitude and you will carry with you here and hereafter the fact that you have not made a mistake, for I promise to do the best I can with what you may give me, and also to make

my future life one of usefulness and be ever grateful and appreciative of any kindness you extend to me. I am a sadder and wiser woman, but my experiences have been bought at a heavy price. If out of your fortune you will help me by at least taking the house off my hands, thereby arranging a price for it, or a sufficient sum in exchange to relieve me of its burden. Your favorable answer to my present appeal will change our whole lives, and I shall never cease to be your debtor.

Most sincerely yours,

KATE HENSHAW ANDREWS,
1312 *Connecticut Ave.*

EXHIBIT 8.

(*Envelope.*)

WASHINGTON, D. C., *Nov.* 13,
3.30 p. m., 1895.

Mr. CHAS. H. ANDREWS,
Suffolk Club,
401 *Beacon St.,*
Boston, Mass.

Personal.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

REGISTRY OF PROBATE.

I, Elijah George, Esquire, register of the probate court within and for the county of Suffolk, hereby certify that John W. McKim, Esquire, whose signature is affixed to the annexed certificate, is the sole presiding judge of said court, duly commissioned and qualified, and that his said certificate is in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, this thirtieth day of March in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] ELIJAH GEORGE, *Register.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Probate Court.

I, John W. McKim, Esquire, judge of the probate court within and for the county of Suffolk, hereby certify that Elijah
81 George, Esquire, whose signature is affixed to the annexed certificate and attestation, is the register and proper certifying officer of said court, and has, by law, the custody of the seal and all the records, books, documents and papers of, or appertaining to said court, and that said certificate and attestation are in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, this thirtieth

day of March in the year of our Lord one thousand eight hundred and ninety-two.

JOHN W. McKIM,
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

REGISTRY OF PROBATE.

I, Elijah George, register of the probate court for said county of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said court, and on file and of record in the office of said court, to wit: the petition, citation, return of service, decree, claim and reasons of appeal, and final decree being the entire record of said court, in the matter of the separate support of Kate H. Andrews of Boston in said county.

In witness whereof, I have hereunto set my hand and the seal of said court, this thirtieth day of March in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] ELIJAH GEORGE, *Register.*

To the honorable the judge of the probate court in and for the county of Suffolk:

Respectfully represents Kate Henshaw Andrews of Boston, in the county of Suffolk, that she is the lawful wife of Charles S. Andrews of said Boston, that her said husband fails, without just cause, to furnish suitable support for her, and has deserted her, and that your petitioner, for justifiable cause, is actually living apart from her said husband.

Wherefore your petitioner prays that said court will, by its order, prohibit her said husband from imposing any restraint on her personal liberty, and make such further order as it deems expedient concerning her support, and will direct an attachment of the property of said Charles S. Andrews in the sum of five thousand dollars to secure the support of your petitioner.

K. H. ANDREWS.

82 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Probate Court.

On the foregoing petition, it is ordered that the sheriff of said county or either of his deputies, give notice to the said Charles S. Andrews to appear at a probate court to be holden at Boston, in said county of Suffolk, on the twelfth day of May A. D. 1890, at ten o'clock in the forenoon, by delivering to him an attested copy of said petition and this order thereon fourteen days at least, before said court, that he may then and there show cause, if any he has, why the prayer of said petition should not be granted.

And in order to secure to the petitioner, and to such children as

may be committed to her care and custody, a suitable support an maintenance, the sheriffs of the several counties, or either of the deputies, are hereby directed to attach, on said petition, the real an personal estate of the said Charles S. Andrews to the amount of fi thousand dollars, conformably to the statute in such case made an provided.

Witness, John W. McKim, Esquire, judge of said court, and th seal of said court, this twenty-eighth day of April in the year on thousand eight hundred and ninety.

ELIJAH GEORGE, *Register.*

To the honorable the judge of the probate court in and for th county of Suffolk:

Respectfully represents Kate Henshaw Andrews of Boston in th county of Suffolk, that she is the lawful wife of Charles S. Andrew of said Boston, that her said husband fails, without just cause, furnish suitable support for her, and has deserted her, and that you petitioner, for justifiable cause, is actually living apart from her sai husband.

Wherefore your petitioner prays that said court will, by its orde prohibit her said husband from imposing any restraint on her pe sonal liberty, and make such further order as it deems expedie concerning her support, and will direct an attachment of the pro erty of said Charles S. Andrews in the sum of five thousand dolla to secure the support of your petitioner.

K. H. ANDREWS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

Probate Court.

On the foregoing petition, it is ordered that the sheriff of sa county, or either of his deputies, give notice to the said Charles Andrews to appear at a probate court to be holden at Boston, in sa county of Suffolk, on the twelfth day of May A. D. 1890, at te o'clock in the forenoon, by delivering to him an attested cop
83 of said petition and this order thereon fourteen days at leas before said court, that he may then and there show cause, any he has, why the prayer of said petition should not be granted

And in order to secure to the petitioner, and to such children may be committed to her care and custody, a suitable support an maintenance, the sheriffs of the several counties, or either of the deputies, are hereby directed to attach, on said petition, the real an personal estate of the said Charles S. Andrews to the amount five thousand dollars, conformably to the statute in such case mad and provided.

Witness, John W. McKim, Esquire, judge of said court, and th seal of said court, this twenty-eighth day of April in the year on thousand eight hundred and ninety.

ELIJAH GEORGE, *Register.*

A true copy.
Attest: JOHN H. PAINE,
Assistant Register.

SUFFOLK, ss: BOSTON, *April* 28, 1890.

By virtue hereof I this day attached certain goods and chattels as the property of the within-named Charles S. Andrews, and placed a keeper in charge of the same, and later on the same day I gave notice to said Charles S. Andrews to appear and show cause at court, as herein required by delivering to him in hand an attested copy of this petition, and order.

THOMAS FEE,
Deputy Sheriff.

Sworn to before me—

WM. D. MARTIN,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

At a probate court holden at Boston, in and for said county of Suffolk, on the twenty-eighth day of July in the year of our Lord one thousand eight hundred and ninety.

On the petition of Kate Henshaw Andrews of Boston, in said county the wife of Charles S. Andrews of said Boston, praying that said court will, by its order, prohibit her said husband from imposing any restraint on her personal liberty, and make such further order as it deems expedient concerning her support.

Due notice of said petition having been given to the said Charles S. Andrews and it appearing to the court that said petitioner, for justifiable cause is actually living apart from her said husband:

84 It is ordered said Charles S. Andrews be and he hereby is prohibited from imposing any restraint on the personal liberty of said petitioner, and that he pay to said petitioner for the support of herself the sum of one hundred dollars forthwith and the further sum of one hundred dollars on the first Monday of each and every month hereafter until the further order of said court, and that the petitioner have the use and enjoyment of the household furniture and other chattels now in the house of said petitioner numbered 381 on Commonwealth avenue in said Boston until the further order of said court.

JOHN W. McKIM,
Judge of Probate Court.

(Reverse side of document:) Kate H. Andrews *vs.* Charles S. Andrews. Petition, citation and decree for separate support. Filed Apr. 28, 1890. Returnable May 12, 1890. Allowed July 28, 1890. Recorded, vol. 632, page 24. For petitioner, —— ——; for respondent, Francis Peabody, Jr., 54 Devon. St.

COMMONWEALTH OF MSSACHUSETTS:

To the honorable the judge of the probate court in and for the county of Suffolk:

Represents Charles S. Andrews of Boston, in the county of Suffolk, that he is the respondent in the petition for separate support of Kate Henshaw Andrews his wife of Boston in the county of Suffolk, that he is aggrieved by a decree of the probate court holden at Boston, in said county of Suffolk, on the twenty-eighth day of July A. D. 1890 whereby said court ordered that said Charles S. Andrews be prohibited from imposing any restraint on the personal liberty of said Kate Henshaw Andrews, and should pay said Kate Henshaw Andrews for the support of herself the sum of one hundred dollars forthwith and the further sum of one hundred dollars on the first Monday of each and every month thereafter until the further order of said court and that said Kate Henshaw Andrews have the use and enjoyment of the household furniture and other chattels now in the house of said Kate Henshaw Andrews numbered 381 Commonwealth avenue in said petition, until the further order of said court.

And he hereby gives notice that he claims an appeal from said decree to the superior court.

Dated the twelfth day of August, A. D. 1890.

CHARLES S. ANDREWS.

(Reverse side of document:) No. 84666. Kate H. Andrews—Charles S. Andrews. Claim of appeal. Filed Aug. 13, A. D. 1890. For appellant, Francis Peabody, Jr., 54 Devonshire St.; for appellee, —— ——.

COMMONWEALTH OF MASSACHUSETTS:

To the honorable the judges of the superior court in and for the county of Suffolk and to Kate Henshaw Andrews, of Boston, in said county of Suffolk; Charles S. Andrews, of Boston, in said county of Suffolk:

Having given due notice at the probate office that he claimed an appeal from the decree of the probate court holden at Boston, in the county of Suffolk, on the twenty-eighth day of July, A. D. 1890, now files in the registry of probate his reasons of appeal, as follows, to wit:

First. Because he has not failed without just cause to furnish suitable support for said Kate Henshaw Andrews.

Second. Because he has not deserted her.

Third. Because said Kate Henshaw Andrews is not actually living apart from her husband for justifiable cause.

Fourth. Because there was no evidence offered by said petitioner at the hearing upon said petition showing or tending to show that said Charles S. Andrews had any funds or property of any kind except the furniture in house numbered 381 Commonwealth avenue, Boston, the use of which furniture is by said decree given to the wife.

Fifth. Because the petition of said Kate Henshaw Andrews on which said decree was made did not allege any funds or property in said Charles S. Andrews.

86 Sixth. Because in point of fact said Charles S. Andrews has no funds with which to carry out the decree of the probate court.

Seventh. Because the evidence at the hearing of said petition did not show that said petitioner was living apart from her husband for justifiable cause.

Eighth. Because the evidence upon the hearing of said petition showed that said petitioner was living an improper life at a place called Narragansett Pier.

Dated the twelfth day of August, A. D. 1890.

CHARLES S. ANDREWS.

(Reverse side of document:) No. 84666. Kate H. Andrews *v.* Charles S. Andrews. Reason of appeal. Filed Aug. 13, A. D. 1890, For appellant, Francis Peabody, Jr., 54 Devonshire St.; for appellee, — —.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

Superior Court.

CHARLES S. ANDREWS, App'l't,
—
KATE H. ANDREWS, App'l'ee.

It appearing to the court that, at the request of Kate H. Andrews, Charles S. Andrews has conveyed to Marcus Morton, Jr., his right as tenant by the curtesy in the land and the house thereon numbered 381 Commonwealth avenue, and that he has also transferred to said Marcus Morton, Jr., at the request of said Kate H. Andrews, the furniture and chattels in said house, it is ordered, adjudged, and decreed by consent of the parties that the appeal of said Charles S. Andrews be sustained, and that the decree of the probate court dated July 28th, 1890, be set aside, and that the petition of said Kate H. Andrews to said probate court be dismissed.

By the court:

THEODORE M. OSBORNE, *Ass't Clerk.*

December 12, 1890.

Copy.
Attest: THEODORE M. OSBORNE, *Ass't Clerk.*

87 (Reverse side of document:) 573. F. Peabody, Jr. Kate H. Andrews, petitioner, *v.* Charles S. Andrews, appellant. Copy. Decree. December 12, 1890.
(Endorsed:) We agree that the within decree be entered. R. M. Morse, Jr., for pet'r. Francis Peabody, Jr., for responden.

EXHIBIT A, F. R. S.

(Front cover.)

Registry list, first ward, annual city election, April 19th, 1892.

On first page under Index A, the name of C. S. Andrews appears, as well as numerous others.

On inside of back cover appears:

STATE OF SOUTH DAKOTA, } ss:
City of Sioux Falls, }

We hereby certify that the within is a true and complete list of the voters in the first ward in the city of Sioux Falls, South Dakota, as far as the same are known to us.

Witness our signatures this nineteenth day of April, 1892.

JAMES ROBBINS,
CHARLES CLARK,
GEORGE W. LOWRY,
Board of Registry.

88 EXHIBIT B, F. R. S.

(Front cover.)

City election, South Dakota poll book.

Ward No. 1, city of Sioux Falls, Minnehaha county, South Dakota. Election held on the 19th day of April, A. D. 1892.

Poll book of an election held at Sioux Falls, Minnehaha county, South Dakota, on Tuesday, April 19th, A. D. 1892, at which time James Robbins, Charles Clark and George W. Lowry were judges of election, and the persons named herein voting thereat.

(Page 1.)

Oath of Judges and Clerks.

STATE OF SOUTH DAKOTA, } ss:
County of Minnehaha, }

At a city election held at engine-house, in the county of Minnehaha, South Dakota, on the 19th day of April, 1892, the polls of said election being open at 8 o'clock a. m. of said day, the following oath was taken by the judges and clerks of election:

Then follow the oaths of James Robbins, Charles Clark and George W. Lowry, as judges of said election, and the oaths of Dan. Getty and Frank Kunerth, as clerks of said election.

(Page 2.)

Poll book.

No. —. Names of voters.

Under names of voters on pages 2, 3, 4, 5, 6 and 7 appear the names of voters voting at said election in said first ward to the number of 406, and among the said names at No. 330, appears the name of the said C. S. Andrews.

On the latter pages of the poll book appear the tally-lists and the enumeration of all the votes cast in said ward 1 of said election for mayor, city treasurer, city justice of the peace, police justice and aldermen.

Upon the last page of said poll book appear the official returns of the said election held in ward 1, city of Sioux Falls, Minnehaha county, State of South Dakota, on the 19th day of April, 1892, said returns showing the total number of votes cast for each candidate at said election, and certified to as a true return by James Robbins, George W. Lowry and Charles Clark, judges of election, attested by Daniel B. Getty and Frank Kunerth, clerks of election.

89 And on the sixteenth day of May, A. D. 1900, the supreme judicial court for the Commonwealth ordered that the clerk of the supreme judicial court for said county of Suffolk make the following entry under said case in the docket of said court—exceptions overruled—by its rescript, as follows, to wit:

90 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 1900.

In the case of Kate H. Andrews, appellant, *vs.* Annie Andrews, appellee, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the court:

HENRY A. CLAPP, *Clerk.*

May 16, 1900.

[Endorsed:] 6084. Eq. No. 533. Eq. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. Kate H. Andrews *vs.* Annie Andrews.

91 And on the fourth day of June, A. D. 1900, Jabez Fox, Esquire, entered an appearance as follows, to wit:

92 SUFFOLK, *ss:*

Supreme Judicial Court.

JUNE 4, 1900.

ANNIE ANDREWS, Pl'ff,
v.
KATE H. ANDREWS, D'f't. } No. 6084. Eq.

In the above action I appear for Annie Andrews.

JABEZ FOX,
Tremont B'ld'g, Boston.

93 And on the thirtieth day of June, A. D. 1900, the following decree was entered by the court, to wit:

94 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Probate.

KATE H. ANDREWS, Appellant,
vs.
ANNIE ANDREWS, Appellee.

Final Decree.

This case came on to be further heard, and now, on consideration thereof and in pursuance of a rescript from the supreme judicial court for the Commonwealth, as appears on record in this cause, it is ordered, adjudged, and decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth, and that his subsequent marriage with Annie Andrews, appellee, was therefore illegal; that said Kate H. Andrews is his lawful widow, and said Annie Andrews is not entitled, as his widow, to administer his estate; that the decree of the probate court appointing her to be administratrix of his estate be reversed and her petition for administration be dismissed.

June 30, 1900.

By the Court:

JOHN NOBLE, *Clerk.*

95 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness Oliver W. Holmes, chief justice of our said supreme judicial court, at Boston, in said county, this eighteenth day
[SEAL.] of July, in the year of our Lord nineteen hundred.

JOHN NOBLE, *Clerk.*

96 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Supreme Judicial Court.

ANNIE ANDREWS, Appellee, Plaintiff in Error,
vs.
KATE H. ANDREWS, Appellant, Defendant in Error.

Assignment of Errors.

Now comes Annie Andrews, the plaintiff in error, and assigns for error in the proceedings and judgment the following, to wit:

First. The court, in ordering her petition for the administration of the estate of Charles S. Andrews to be dismissed on the ground that she was not the widow of said Andrews, failed to give full faith and credit, as required by the Constitution and laws of the United States, to the judicial proceedings had in the State of South Dakota by which the said Andrews was divorced from the defendant in error, Kate H. Andrews.

Second. Section forty-one of chapter one hundred and forty-six of the Public Statutes of Massachusetts, as applied to this case, is repugnant to the Constitution and laws of the United States, and the court upheld said statute.

ANNIE ANDREWS,
By JABEZ FOX,
Her Attorney.

97 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *July* 18, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Andrews *vs.* Andrews, decided on the 16th day of May, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

98 HOLMES, *C. J.*:

This is an appeal from the decree of the probate court appointing Annie Andrews administratrix of the estate of Charles S. Andrews. The appellant is the first wife of the deceased. The appellee married him later in good faith after he had obtained a decree of divorce in South Dakota. The questions are whether the divorce is valid in this State or whether, if it is invalid, the appellant, on the ground of connivance and acquiescence, is estopped to deny its validity. Charles S. Andrews went to South Dakota for the purpose of getting the divorce, and intended to return to Massachusetts as soon as he had done so. Subject to this intention, it is found that he intended to become a resident of South Dakota for the purpose of getting a divorce, and to do all that was needful to make him such a resident. The statute of South Dakota forbids a divorce "unless the plaintiff has in good faith been a resident of the Territory ninety days next preceding the commencement of the action." Compiled Laws of Ter-

ritory of Dakota, § 2578; St. South Dakota 1890, c. 105, § 1. Andrews lived in South Dakota ninety days, and the Dakota court found in favor of its own jurisdiction, substantially in the words of the section just quoted, and granted the divorce for a cause which would not authorize a divorce by the laws of this Commonwealth.

The consensus of English-speaking courts founds jurisdiction of divorce on domicil. It may be that a State might substitute for domicil, by statute, if it chose, simply bodily presence within its borders for a certain number of days. It may be, at least under the Constitution of the United States, that a divorce granted under such a statute between parties, both of whom were before the court, would be entitled to respect here, notwithstanding Pub. Sts., c. 146, § 41. But compare People *v.* Dawell, 25 Mich., 247, 264; Dolphin *v.* Robins, 7 H. L. Cas., 390, 414. But no such question arises in this case, because the language of the South Dakota statute must be taken to require not merely bodily presence, but domicil. In the light of the decisions upon similar acts and the generally accepted rule making domicil the foundation, the words "resident of the Territory" mean domiciled in the Territory, whether they also mean personally present or not. Graham *v.* Graham, 81 N. W. Rep., 44; Dickinson *v.* Dickinson, 167 Mass., 474, 475; Reed *v.* Reed, 52 Mich., 117, 122; Leith *v.* Leith, 39 N. H., 20, 41; Van Fossen *v.* State, 37 Ohio St., 317, 319.

The finding of the single justice clearly means that the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts. It is true that he meant to do all that was needful to get a divorce, but he meant it because he was mistaken as to what was needful. In other words, he only meant to do what he supposed to be needful, and that was not enough. Whether if he had known what was needful he would have meant that and would have done it is a speculation. In fact, he did not mean or do it on the facts so far stated. It is clear that the finding of the South Dakota court in favor of its own jurisdiction upon an *ex parte* hearing would not be conclusive, but that the facts would be open to examination here. Adams *v.* Adams, 154 Mass., 290, 294, and cases cited; Hanover *v.* Turner, 14 Mass., 227, 230, 231; Thompson *v.* Whitman, 18 Wall., 457; Hoffman *v.* Hoffman, 46 N. Y., 30; Gregory *v.* Gregory, 78 Maine, 187; Watkins *v.* Watkins, 125 Ind., 163.

But the appellant appeared in the divorce suit and denied the alleged residence of the deceased, although afterwards, upon receiving a certain sum of money, she directed her counsel to withdraw. There is a plain difference between a case in which a respondent has not submitted herself to the power of the court and one in which she has done so. In the former a foreign State within whose territory she is domiciled may decline to allow her rights to be affected by the decree, whatever the record may allege. In the latter there is stronger ground for saying that if the libel alleges residence and any other facts necessary to give jurisdiction the libellee no more can dispute the validity of the decree on the ground that the court

was mistaken as to residence than she could upon the ground that it went wrong on the merits. Notwithstanding the language of some decisions which do not distinguish in terms between judgments where there has been no service and those where there has been no appearance—Sewall *v.* Sewall, 122 Mass., 156, 161—the decisions in some States where the question has been raised is in favor of the distinction. Kinnier *v.* Kinnier, 45 N. Y., 535, 540, 541; Cross *v.* Cross, 108 N. Y., 628, 630; Fairchild *v.* Fairchild, 54 N. J. Eq., 678; Waldo *v.* Waldo, 52 Mich., 94, 99; *In re* Ellis's Estate, 55 Minn., 401, 411; Van Fleet, Collateral Attack, § 648, § 389, p. 377. See Loud *v.* Loud, 129 Mass., 14, 18; Thompson *v.* Whitman, 18 Wall., 457; Bigelow, Estoppel (5th ed.), 296.

Supposing the State decisions just mentioned to be correct as to the effect of the decree between the parties, the general consequence would be that it was effective as to the rest of the world. As a general rule, it would be inconvenient to admit that parties who were divorced as between themselves were not divorced as against others. Kinnier *v.* Kinnier; Waldo *v.* Waldo, *ubi supra;* Adams *v.* Adams, 154 Mass., 290, 295. But a further distinction is taken. The world at large has no interest in the divorce, and therefore may be bound by it; but it is suggested that the State of the domicil has an interest, and that it cannot be concluded by a mere false recital in the record, because the foreign court did not even pretend to jurisdiction over that State. People *v.* Dawell, 25 Mich., 247, 257. In People *v.* Dawell this proposition was applied in favor of the State of the domicil as a prosecutor, and at an earlier date it was applied by this court in favor of the State as a legislator. Chase *v.* Chase, 6 Gray, 157, 161.

It will be borne in mind that on the facts before us the case is not one in which the legislature of South Dakota has undertaken to allow the grant of a divorce. It is one in which the court of that State has been deceived and in which it would have refused to act and would have had no right to act had it known the facts. In such a case as this the State of the domicil, if it sees fit, may decline to be bound by recitals in a record to which it is not a party. It may say, as Massachusetts has said by Pub. Sts., c. 146, § 41, that it will be governed by the fact, not by a possibly collusive record, and therefore that the fact must be ascertained, tried, and found here. Whether or not the statute goes farther than the law would go without it, we are of opinion, in accordance with the decision in Chase *v.* Chase, that, as applied to this case, it does not go beyond the constitutional powers of the State. In Hardy *v.* Smith, 136 Mass., 328, 331, it would seem from the papers in the case that there was an appearance for the respondent in the Utah court. The validity of the statute has been affirmed in a general way more than once—Sewall *v.* Sewall, 122 Mass., 156, 161; Smith *v.* Smith, 13 Gray, 209; Dickinson *v.* Dickinson, 167 Mass., 174—and confined, as it should be, to persons retaining their Massachusetts domicil—Clark *v.* Clark, 8 Cush., 385, 387—it seems to be mainly declaratory of the law—Lyon *v.* Lyon, 2 Gray, 367, 368—unless in cases like the present, where, perhaps, apart from it, the parties, both having appeared,

could not dispute the foreign adjudication of jurisdiction disclosed by the record. A further question might arise, as we have suggested, if the State granting the divorce had established a test of jurisdiction other than domicil; but that has not happened and is not likely to happen.

The Commonwealth having intervened by legislation, the appellant gets the benefit of it irrespective of any merits of her own. The possibility of a distinction such as was sanctioned by *In re* Ellis's Estate, 55 Minn., 401, upholding the divorce as between the parties, and so far as concerns property rights, but treating it as void as against the State, and for the purposes of the criminal law is done away with by the act. It is settled that in a case within the statute the divorce is to be treated here as void for all purposes. Chase *v.* Chase, 6 Gray, 157, 160. It is settled that there is no estoppel, even as against the party instituting the foreign proceedings. Smith *v.* Smith, 13 Gray, 209, 210. If the appellant's conduct amounted to connivance, as found, so that she could not have maintained a libel for adultery on the ground of the second marriage, that does not go far enough to constitute an estoppel. Loud *v.* Loud, 129 Mass., 14, 19. All that she did was to withdraw her active opposition to the divorce in consideration of a payment of money, and thereafter to remain silent. We are compelled to overrule the exceptions.

Exceptions overruled.

[Endorsed:] Andrews *vs.* Andrews. Certified copy of the opinion of the supreme judicial court.

99 *Citation on Writ of Error.*

Commonwealth of Massachusetts to Kate H. Andrews, of Boston, in the county of Suffolk, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States on the * fourth day of August next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of the Commonwealth of Massachusetts, wherein Annie Andrews, of Brookline, in the county of Norfolk, in said Commonwealth, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oliver Wendell Holmes, chief justice of the supreme judicial court of the Commonwealth of Massachusetts, this sixth day of July, in the year of our Lord one thousand nine hundred.

OLIVER WENDELL HOLMES.

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

100 JULY 12, 1900.

Due service of the within citation is hereby acknowledged.

KATE H. ANDREWS,
By FRANK D. ALLEN,
Her Attorney of Record.

101 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Supreme Judicial Court.

I, John Noble, clerk of the supreme judicial court within and for the county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record in the case of Annie Andrews, administratrix, appellee, *v.* Kate H. Andrews, appellant, from a decree of the probate court in said supreme judicial court determined and annexed to and transmitted with said record.

II. The assignment of errors.

III. The copy of the opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with—

IV. The original citation.

V. The acceptance of service of the same.

In witness whereof I have hereunto set my hand and af-
102 fixed the seal of said court this eighteenth day of July, in the year of our Lord one thousand nine hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

103 (*Bond on Writ of Error.*)

Know all men by these presents that we, Annie Andrews, of Brookline in the county of Norfolk and Commonwealth of Massachusetts, as principal, and Mary E. Paul, of said Brookline, as surety, are held and firmly bound unto Kate H. Andrews, of Boston, county of Suffolk and said Commonwealth, in the full and just sum of one thousand (1,000) dollars, to be paid to the said Kate H. Andrews, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the sixth day of July, in the year of our Lord one thousand nine hundred (1900).

Whereas lately, at a term of the supreme judicial court held at Boston, within and for the county of Suffolk and Commonwealth of Massachusetts, on the thirtieth day of June, A. D. 1900, in a suit depending in said court between said Kate H. Andrews and said Annie Andrews, a decree was rendered against the said Annie Andrews, and the said Annie Andrews having procured a writ of error and filed a copy thereof at the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the

said Kate H. Andrews, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth day of August next:

Now, the condition of the above obligation is such that if the said Annie Andrews shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ANNIE ANDREWS. [L. S.]
MARY E. PAUL. [L. S.]

Signed, sealed, and delivered in presence of—
FREDERICK C. ALLEN.

Approved:
OLIVER WENDELL HOLMES,
Chief Justice S. J. C.

Copy.
Attest: JOHN NOBLE, *Clerk.*

Endorsed on cover: File No., 17,849. Massachusetts supreme judicial court. Term No., 364. Annie Andrews, plaintiff in error, vs. Kate H. Andrews. Filed July 28, 1900.

2933

No. 119. 23

Br. of Bartlett & Anderson for

Office Supreme Court U. S.
FILED
FEB 18 1902
JAMES H. MCKENNEY,
Clerk.

Filed Feb. 18, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

119.

ANNIE ANDREWS, PLAINTIFF IN ERROR,

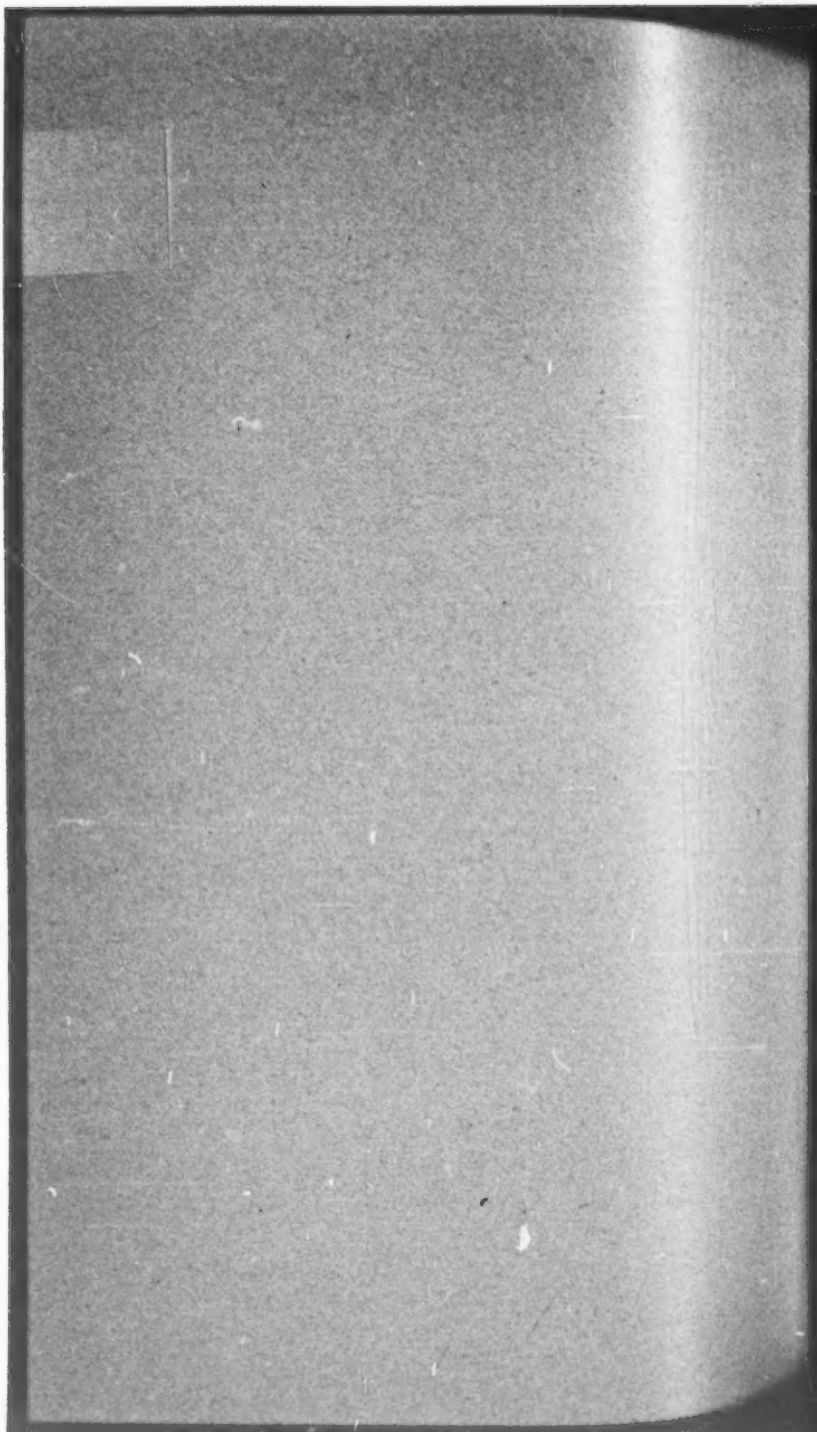
vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES W. BARTLETT,
ELBRIDGE R. ANDERSON,
Attorneys for Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 119.

ANNIE ANDREWS, *Plaintiff in Error,*
vs.
KATE H. ANDREWS.

STATEMENT OF THE CASE.

This case comes to this Court upon a writ of error sued out by Annie Andrews, of Boston, and directed to the Supreme Judicial Court of the State of Massachusetts. The writ issued on the sixth day of July, 1900, and was allowed by Oliver Wendell Holmes, clerk for the Supreme Judicial Court and Chief Justice of said court (page 1, Record).

The plaintiff in error assigned as error the following: —

First. The Court, in ordering her petition for the administration of the estate of Charles S. Andrews to be dismissed on the ground that she was not the widow of the said Andrews, failed to give full faith and credit, as required by the Constitution and laws of the United States, to the judicial proceedings had in the State of South Dakota, by which said Andrews was divorced from the defendant in error, Kate H. Andrews.

Second. Section 41 of Chapter 146 of the Public Statutes of Massachusetts, as applied to this case, is repugnant to the Constitution and laws of the United States, and the Court upheld said statute.

Annie Andrews filed her petition in the Probate Court for the county of Suffolk and State of Massachusetts upon the fourteenth day of October, 1897, setting forth in said petition that she was the

widow of said Charles S. Andrews, and that there had been born to her and said Charles S. Andrews two children, minors, whose names appear in said petition. She claimed the right to be appointed as such administratrix as such widow. On the fourteenth day of October the Probate Court, by its decree, appointed her as such administratrix (pages 2 and 3, Record). On the fifth day of November, 1897, the defendant in error claimed an appeal to the Supreme Judicial Court for the State of Massachusetts and filed objections to said decree, claiming that she, and not the said Annie Andrews, was the widow of said Charles S. Andrews (pages 3 and 4, Record). On said November fifth, the defendant in error entered her appeal in the Supreme Judicial Court and filed her objections to said decree of the Probate Court appointing the plaintiff in error as such administratrix, in which said objections said defendant in error set out that the statement of the plaintiff in error in her petition for administration to the Probate Court, "that she is the widow of Charles S. Andrews, is not true, as the defendant in error, at the time of the death of the said Charles S. Andrews, was his only lawful wife and is now his widow" (page 4, Record). The plaintiff in error duly appeared, and on the nineteenth day of January, 1899, she filed an answer (pages 4 and 5, Record), in which she denied that the defendant in error is a person interested in the estate of Charles S. Andrews, deceased, and denied that said Kate is the widow of the said Charles S. Andrews, and also that she (the defendant in error) has no right in law to prosecute this appeal, and this court (the Supreme Judicial Court of the State of Massachusetts) had no jurisdiction to entertain, hear or determine the same. Thereafter, a hearing was had on the said appeal upon the issues raised by the pleadings, and on the sixth day of February, 1899, the decree was entered in said court as follows: "Decree of the Probate Court reversed" (page 5, Record). At the hearing in the Supreme Judicial Court, to wit, the trial court, the presiding justice made certain findings of fact and rulings of law which are to be found upon pages 31 to 33 of the Record. The plaintiff in error requested the Court to make certain rulings, which requests for rulings are found on page 31 of the Record. The ruling requested which has to do with the question raised by the writ of error is as follows:

First, that upon all the evidence in the case the appellant has no standing in this court and is not a person interested in the estate of Charles S. Andrews deceased." The presiding justice refused to rule as requested and the plaintiff in error duly excepted, both to the refusal of the presiding justice to rule as requested, and also to the rulings made by the said presiding justice, which were as follows: "That the divorce obtained in South Dakota is, by Public Statutes, Chapter 146, Section 11, of no force or effect in this Commonwealth; that the respondent must be regarded as the lawful wife of the said Charles; that the second marriage is therefore illegal" (page 33, Record). The plaintiff in error duly filed her bill of exceptions in the Supreme Judicial Court for the Commonwealth, which bill of exceptions is to be found upon page 5 of the record. Thereafter, a hearing was had upon the said bill of exceptions, and upon the sixteenth day of May, 1900, the Supreme Judicial Court decided said case so presented, and delivered the opinion of the court by Mr. Chief Justice Holmes (pages 75 to 79, Record). Thereafter, on June 30, 1900, the final decree of said Supreme Judicial Court was entered (page 74, Record). The final decree was as follows: —

"This case came on to be further heard, and now, on consideration thereof, and in pursuance of a rescript from the Supreme Judicial Court for the Commonwealth as appears of record in this cause, it is ordered, adjudged and decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth, and his subsequent marriage with Annie Andrews, appellee, is therefore illegal; that said Kate H. Andrews is the lawful widow, and said Annie Andrews is not entitled as his widow to administer his estate; that the decree of the Probate Court appointing her to be administratrix of his estate be reversed and her petition for administration be dismissed. June 30, 1900."

FACTS.

Nov. 19, 1891, Charles S. Andrews, who had formerly resided in the State of Massachusetts, but who at that time was living in South Dakota, filed a petition for divorce in the proper court of South Dakota, in which he alleged that he had resided in South Dakota for ninety days, the period required by the laws of that State (page 36, Record). His wife, Kate H. Andrews, appeared in those proceed-

ings and filed an answer denying residence and the other facts alleged in the petition. She also in those proceedings petitioned the Court to grant her alimony *pendente lite*, and for an allowance with which to prepare her case for trial and for attorneys' fees. Upon that petition she had a full hearing, and the Court granted her the allowance and counsel fees prayed for, but refused to allow her alimony *pendente lite*, as appears on pages 60 and 61 of the record. Subsequently she withdrew her appearance pursuant to an agreement, under which, and in consideration of the payment of $2050, she "consented to the granting of divorce for desertion in the South Dakota Court" (page 64, Record). May 6, 1892, the South Dakota Court (pages 61 and 62, Record) made certain findings, and among them, that the plaintiff, Charles S. Andrews, "is and was for more than ninety days next preceding the commencement of this action a resident in and of the State of South Dakota in good faith," and entered a decree of divorce. Andrews returned to the State of Massachusetts and on Jan. 11, 1893, married the plaintiff in error, Annie Andrews. The issue of this marriage are two children, still living.

Annie Andrews "at the time of the marriage believed the said Andrews had the right to marry. She had nothing whatever to do with the divorce, and was in no way the alleged or actual cause of the disagreement between the said Charles and the said appellant, and throughout has acted in the utmost good faith. She knew of the divorce, but believed it was legal and had reason so to believe." Upon the hearing in the trial court the presiding judge made certain findings of fact (pages 31–33, Record), the most important of which, in addition to the facts above stated, are as follows: —

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls at the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident; and I find he became a resident, if, as a matter of law, such finding is warranted in the facts above quoted." (Page 32, Record.)

At the conclusion of his finding, the Court made the ruling hereinbefore set forth.

ARGUMENT.

FIRST.

Jurisdictional Question.

It has been held by this Court that it has the authority to review the final decisions and judgment of a State court in cases where there has been drawn in question a statute or authority exercised under the State upon the ground of repugnance to the Constitution, or a law, or treaty of the United States, when the decision has been in favor of the validity of the State law or authority in question, and also in a case where a right has been claimed under the Constitution or law of the United States and the decision has been against the right so claimed.

Home Insurance Co. *v.* City Council of Augusta, 93 U. S. 116.

First. The decree of the Massachusetts Court dismissing the petition for administration of the plaintiff in error on the ground that she was not the widow of Charles S. Andrews was final and conclusive upon the question of her widowhood, and her rights in the property of her husband, Charles S. Andrews. After the dismissal of that petition she could never again assert her right to the property of Charles S. Andrews as his widow.

Under the laws of the State of Massachusetts, Chapter 130, Public Statutes, Section 1, provides, that administration of the estate of an intestate shall be granted to one or more of the persons hereinafter mentioned and they shall be entitled thereto as follows: "The widow of the deceased or his next of kin, or the widow jointly with the next of kin, as the Probate Court may deem fit."

The direct issue raised by the petition for administration was the widowhood of the petitioner. By the final decree of the Supreme Judicial Court, after rescript from the Supreme Judicial Court for the Commonwealth, the question of her widowhood was forever settled and the status of the children born of the marriage was fixed, and so long as said final decree remains in force she is adjudged to be no widow. Her petition was dismissed out of the court, and was finally disposed of.

Second. The final decision and judgment of this case was based upon Chapter 146, Sect. 41, Public Statutes of Massachusetts, the validity of which was drawn in question upon the ground of its repugnance to the Constitution and laws of the United States in so far as it applied to the facts in this case, and the decision of the Court was in favor of the validity of that statute. It was claimed that as applied to the facts in this case that statute was repugnant to the Constitution of the United States, in that in following the said statute the Court was compelled to declare the divorce obtained in the State of South Dakota, after judicial proceedings had been taken in the State of South Dakota and a decree for divorce granted, void and of non effect in this Commonwealth; and in so doing that the Court must fail to give full faith and credit to the proceedings and conclusions of the South Dakota Court, which is repugnant to the United States Constitution, Article 4, Sect. 1, and the United States Revised Statutes, Sect. 905.

There can be no doubt that the question in regard to the statute was duly raised and at the proper time. The plaintiff in error relied on the Dakota divorce to make out her claim of widowhood (pages 5–21, Record). The plaintiff in error raised the question and brought it to the attention of the trial court, in requesting the Court to rule that upon all the evidence in the case the appellant was not a person interested in the estate of Charles S. Andrews (page 31, Record). The trial court in the original hearing held the statute to be valid and the Dakota divorce of non effect in this Commonwealth, and that the defendant in error was the lawful wife of the said Andrews, and that the marriage to the plaintiff in error was illegal (page 33, Record). The Supreme Judicial Court for the Commonwealth upheld the statute, and declared in its opinion (page 77, Record) that as applied to this case "it does not go beyond the constitutional powers of the State"; and again, "the Commonwealth having intervened by legislation, the appellant gets the benefit of it irrespective of any merits of her own." Again, "it is settled that in a case within the statute, the divorce is to be treated here as void for all purposes."

Third. In this case the plaintiff in error claimed a right under the Constitution and laws of the United States and the decision of

e Supreme Judicial Court for the Commonwealth, and the final ecree of said Court denied her the right which she claimed. The ght claimed by the plaintiff in error was the right under the Con- itution of the United States, Article 4, Section 1, that full faith and redit should be given in the State of Massachusetts to the judicial roceedings and decree of the State of South Dakota by which a ivorce was granted to Charles S. Andrews from the defendant in rror, and the decision and final decree in the said cause was against ne said right so claimed.

If the Court, from an inspection of the record, should say that he federal question was not directly in terms raised by the rulings equested, then the plaintiff in error claims that it does appear rom the record by clear and necessary intentment that the federal uestion was directly involved, so that the State court could not have iven judgment without deciding it.

Powell *v.* New Brunswick County, 150 U. S. 433.

There were only two questions raised by the bill of exceptions in he original case, and there were only two questions which were assed upon by the Supreme Judicial Court for the Commonwealth. One was the constitutional question, the other was a question of estoppel (page 31, Record). The Supreme Judicial Court for the Commonwealth, in its opinion (page 78, Record), holds that there was no estoppel. That disposes of that question (excepting so far as the question of estoppel is involved in the constitutional question) against the plaintiff in error in this court, and left the case simply upon the question of widowhood as affected by the South Dakota divorce. The South Dakota divorce, and all of the proceedings connected therewith, was a part of the bill of exceptions from the trial court to the Supreme Judicial Court for the Commonwealth, and it appears from the record that Charles S. Andrews was married at one time to the defendant in error; that after that marriage the proceedings were had in the State of South Dakota and the divorce granted; and thereafter the said Charles S. Andrews was married to Annie Andrews, the plaintiff in error. Annie Andrews claimed to be the widow of Charles S. Andrews, and relied upon the South Dakota divorce upon that question. The defendant in error denied the

widowhood, and relied upon the statutes of Massachusetts relating to divorce as rendering null and void that divorce obtained in the State of South Dakota.

Of necessity, the validity of the proceedings in South Dakota were directly in question, and the constitutionality of the Massachusetts statute was also in question, and in order to finally dispose of the said cause the Supreme Judicial Court for the Commonwealth was compelled to dispose of the question of the validity of the divorce in South Dakota and to dispose of the question of the validity of the Massachusetts statute as affecting that divorce, and to dispose of the question as to whether that statute was repugnant to the Constitution of the United States, Article 4, Section 1. Without the decision of the constitutional question, the South Dakota divorce could not be disposed of. That this statement is true, and that the South Dakota divorce was declared null and void on account of the statute, which was declared to be valid, as applied to this case, the record discloses, in the ruling of the trial court (page 33, Record), that the trial court bases its decision and decree upon the fact as found by it and the law as ruled by it, that the divorce obtained in South Dakota is, by Pub. Stats., Chap. 146, Sect. 41, of no force or effect in this Commonwealth, and, in the opinion of the Supreme Judicial Court for the Commonwealth (page 77, Record), "it (the statute) does not go beyond the constitutional powers of the State" (page 78, Record); "the Commonwealth having intervened by legislation the appellant gets the benefit of it, irrespective of any merits of her own."

"The questions are whether the divorce is valid in this State (Massachusetts), or whether, if it is invalid, the appellant, on the ground of connivance and acquiescence, is estopped to deny its validity." (Opinion of Holmes, C. J., page 75, Record.)

On page 78 of the record, the Court disposes of the question of estoppel against the plaintiff in error in a few lines, and all of the opinion, other than those few lines, is devoted to the question, "whether the divorce is valid in this State," and the foundation of the question is the statute of Massachusetts. (Pub. Stats., Chap. 146, Sect. 41.)

The decree following the rescript of the Supreme Judicial Court

on its decision of the case, as shown in its opinion, is based upon the constitutional question and that alone.

Fourth. It is not necessary that the federal question appear affirmatively upon the record or in the opinion if the adjudication of such a question is involved in the disposition of the case by the State court.

Kaukauna Co. *v.* Green Bay, etc., 142 U. S. 254.
Willson *v.* Blackbird Creek Marsh Co., 2 Peters, 245.
Armstrong *v.* Athens Co., 16 Peters, 281.
Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574.
Eureka Lock Co. *v.* Yuba Co., 116 U. S. 410.

Fifth. In this case the fact that the Court, neither in the decree or the opinion, mentions the questions or the claim that full faith and credit should be given to the judicial proceedings and findings of the South Dakota Court in terms cannot affect the jurisdiction of this Court, for the plaintiff in error claims that the record fairly presents a federal question and claims that its decision was necessary to the determination of the case.

Chapman *v.* Goodnow's Adm., 123 U. S. 540.

The Court there said: "If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709, Revised Statutes, as if it had been specifically referred to and the right directly refused."

This Court has also decided that when judgment necessarily involves an adjudication of the claim that a statute of the State is in derogation of the rights secured by the United States Constitution, the court has jurisdiction.

Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574.

SECOND.

Argument of Constitutional Question.

Both parties submitted to the jurisdiction of the South Dakota court. No fraud was practised upon the court. Under the Constitution of the United States the judgment of divorce is conclusive. It appears that the State court felt constrained to sustain the appeal because of Pub. Stats. of Masachusetts, Chap. 146, Sect. 41, which provides that, "when an inhabitant of this Commonwealth goes into another state or country to obtain a divorce for a cause which occurred here while the parties resided here, . . . a divorce so obtained shall be of no force or effect in this Commonwealth." It is important, therefore, to consider the validity and scope of this statute.

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

United States Constitution, Article 4, Section 1.

"And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

United States Revised Statutes, Section 905.

It is clear that such judgments as are protected by this constitutional provision cannot be nullified by any State law, and that, upon the question what judgments are so protected, the decisions of the United States Supreme Court, so far as they go, are controlling.

Christmas *v.* Russell, 5 Wall. 290.

Laing *v.* Rigney, 160 U. S. 531.

It is now settled that a judgment in a personal action is of no validity unless the Court has jurisdiction of the defendant by service or by appearance, and even in divorce matters a radical distinction is made between *ex parte* judgments and judgments rendered in the presence of both parties.

On the one hand there is a plain intimation that an *ex parte* judgment of divorce is not conclusive beyond the State in which it is rendered, and that every other State is at liberty to give it such effect as may seem proper as a matter of comity or public policy.

Pennoyer *v.* Neff, 95 U. S. 714, 731, 734.

At page 731 the Court says: —

"The tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

On page 734 the Court says: —

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert by anything we have said that a State may not authorize proceedings to determine the status of one of its citizens toward a non-resident, which would be binding within the State though made without service of process or personal notice to the non-resident."

"On the other hand it is settled that where the appellant has resided in the State for the period required by the local laws and the defendant is before the Court, a judgment of divorce is conclusive everywhere."

Cheever *v.* Wilson, 9 Wall. 108.

This is apparently the latest decision of the United States Supreme Court upon the extra-territorial effect of a divorce judgment where the defendant is before the Court.

It is important to see, therefore, just where that case leaves us. Mrs. Cheever, formerly of Washington, D. C., brought suit for divorce in Indiana. Her husband, residing in Washington, appeared. The Court decreed a divorce, gave the custody of certain children to Cheever, and ordered Mrs. Cheever to give him a power of attorney to collect certain rents in Washington for the maintenance of the children. Subsequently, Cheever brought suit against the wife and one Wilson to enforce specific performance of the order as to the rents. Wilson contended that the Indiana divorce was void because Mrs. Cheever was not a resident of that State. Upon this question the views of the Supreme Court are shown from the following extracts from the opinion.

Swayne, J., page 122: —

"The petition for divorce makes a case within the statute. It alleges that the petitioner was a *bona fide* resident of the county where it was filed. . . . The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. . . . The Court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual according to the law and the adjudications in Indiana. The Constitution and laws of the United States gave the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered it is equally conclusive everywhere in the Courts of the United States."

"It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient is a point on which the authorities are not in harmony. We do not deem it necessary to express an opinion on that point. The finding is clearly sufficient until overcome by adverse testimony."

Under this decision, if Andrews was in fact a resident of South Dakota when he applied for his divorce, then the judgment is conclusive. If he was not a resident, then the question as to whether the judgment is open to attack upon that ground is left undecided.

First. The appellee contends that Andrews was a resident of South Dakota at the time he applied for his divorce.

"He became a resident if, as a matter of law, such finding is warranted on the facts above stated." (Finding of Judge Hammond, Record, page 32.)

Do the special facts found by the judge make it impossible as a matter of law that Andrews should have been a resident of South Dakota?

The fact that he went there for the purpose of obtaining a divorce is not conclusive.

A man may move from one town to another for the avowed purpose of escaping taxation, but his change of residence depends not upon his motive, but upon his intent. "The wish to change for that

purpose does not show the want of real intention to change, but rather to the contrary."

Thayer *v.* Boston, 124 Mass. 132, 148.

The fact that Andrews "intended to return to this State when the business was finished" is not conclusive.

Many families take up their residence in a college town when their sons enter college, intending to remove therefrom when the college course is finished. This intention is not inconsistent with an actual residence in a college town.

Methodist clergymen are required by the rules of their denomination to change from place to place every two or three years, but these rules do not prevent the clergyman from obtaining a residence and a right to vote in every place in which he resides.

Holmes *v.* Green, 7 Gray, 299.
Carnoe *v.* Inhabitants of Freetown, 9 Gray, 357.
Sleeper *v.* Page, 15 Gray, 349, 350.

In Holmes *v.* Green, the plaintiff removed from Fall River to Tiverton, May 6, 1853, and returned in June, 1854. When he left Fall River he declared that he intended to retain his domicile in Fall River, and that he was leaving for a temporary purpose. Held, nevertheless, that he had changed his domicile.

Bigelow, J.: "No case can be found where a domicile of a party has been made to depend on the bald intent, unaided by any other proof."

In Sleeper *v.* Page, 15 Gray, 349, 350, the Court said: "If his residence out of the Commonwealth was but temporary, yet if the time of his proposed return was indefinite, he retained no domicile in the Commonwealth."

Second. The appellee contends, in the second place, that the finding of the South Dakota court that the libellant (Andrews) was a resident of that State is conclusive in the absence of fraud. The defendant was before the Court; it was open to her to try that question there; she cannot try it in Massachusetts or here.

"In every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action. There is, however, another class of facts which are termed quasi jurisdictional, which are necessary to be alleged and proved in order to set the machinery of law in motion, but which, when properly alleged and established to the satisfaction of the Court, cannot be attacked collaterally. Examples of these are the allegations and proofs of the requisite diversity of citizenship and the amount in controversy in a federal court."

Brown, J., in Noble *v.* Union River Logging Railroad, 147 U. S. 165.

Within the distinction here indicated the fact of the residence of the libellant in a divorce suit in which a defendant appears is quasi jurisdictional. By the great preponderance of authority, the findings of the Court upon this question are held to conclude the parties to the proceeding in the absence of fraud.

Ellis' Estate, 55 Minn. 401.
Kinnier *v.* Kinnier, 45 N. Y. 535.
Jones *v* Jones, 108 N. Y. 415.
Kirrigan *v.* Kirrigan, 15 N. J. Eq. 147.
Fairchild *v.* Fairchild, 53 N. J. Eq. 678 (1895).
Waldo *v.* Waldo, 52 Mich. 94 (1883).
Van Fleet Collateral Attack, Section 648 (1892).

Fairchild *v.* Fairchild fully covers the case at bar. Mrs. Fairchild filed in New Jersey a petition against her husband for maintenance. Fairchild set up a judgment for divorce obtained by him in Kansas. The court below found as a fact that he had abandoned the respondent without justifiable cause, that he was not a *bona fide* resident of the State of Kansas, but that he went there solely for the purpose of instituting divorce proceedings, and granted the petitioner the relief asked for. The husband appealed to the Court of Errors and Appeals, and the judgment was reversed upon grounds which appear in the following extracts from the opinion: —

Gummere, J., page 680: "The Court had jurisdiction over the parties, the respondent having voluntarily appeared and made

defence to the action brought against her there by the appellant. The question of the *bona fide* residence of the appellant in Kansas, which was passed upon by the Court of Chancery, was one for the exclusive consideration of the Kansas court. By the statute of that State the plaintiff in an action of divorce is required to have been an actual resident in good faith of the State for one year next preceding the filing of his petition. It was therefore necessary for the Kansas court, before taking up the consideration of the appellant's case upon the merits, to determine whether he had been an actual resident of that State in good faith for at least a year next preceding the commencement of the action, and that decision, unless procured by fraud, is conclusive, not only in Kansas, but in every other jurisdiction where the validity of the judgment comes in question. Can this judgment rendered by a court which had jurisdiction over the parties, and over the subject-matter of the litigation, be ignored by the courts of this State, notwithstanding the prescription of the Constitution of the United States, supplemented by the federal statute of 1790, that the judicial proceedings of each State shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State where such proceedings are had? It seems to me not; for while this constitutional provision and the federal statute referred to have been the subject of more or less diversity of opinion, it is now entirely settled that the only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another State are: first, where the adjudging tribunal had no jurisdiction over the person against whom the judgment was pronounced, or over the subject-matter of the litigation; and, second, where the adjudication of the foreign tribunal was obtained by fraud."

In Jones *v.* Jones, 108 N. Y. 415, it appeared that the wife went from New York to Texas and after she had been there six months filed a petition for divorce against her husband. Her husband appeared denying the jurisdiction of the Court, and the question of her actual residence in Texas was tried by the jury and determined in her favor. Subsequently the husband brought suit for divorce in New York. The single question argued by counsel and considered by the Court was whether Jones, by appearing under protest as he

did, had submitted himself to the jurisdiction of the Texas Court. It was assumed on all hands that if he had so submitted himself the question of the wife's residence in Texas could not be tried again in New York.

The conclusive effect given by the New York Courts to judgments of divorce rendered in the presence of both parties is the more noteworthy from the fact that it is still held in New York that *ex parte* judgments of divorce obtained in other States are of no validity in New York whether the libellant was or was not a resident of the State where the divorce was obtained.

People *v.* Baker, 76 N. Y. 78.
O'Dea *v.* O'Dea, 101 N. Y. 23.

Waldo *v.* Waldo, 52 Mich. 94, sustains our contention fully and controls everything to the contrary in

People *v.* Dawell, 25 Mich. 247.

It does not appear that there is any statute in New York or New Jersey declaring that a divorce obtained in another State under certain circumstances shall be void. But the New York and New Jersey decisions seem to rest upon the controlling force of the United States Constitution, and a judgment which is protected by that instrument is as safe from legislative as from judicial attack.

If we are right in assuming that under the decisions the Federal Constitution does not give extra-territorial effect to an *ex parte* judgment of divorce, then the validity of the Massachusetts statute so far as it affects such divorce cannot be questioned, and the decisions of this court concerning such divorces may be put on one side. We find only two cases in which a judgment of divorce obtained in another State, the defendant appearing, has been held void in Massachusetts.

Chase *v.* Chase, 6 Gray, 157.
Hardy *v.* Smith, 136 Mass. 328.

In Chase *v.* Chase no reference was made to the Federal Constitution and it seems impossible to reconcile the decision with Cheever *v.* Wilson, 9 Wall. 108.

In Hardy *v.* Smith the wife obtained a decree of divorce from a

Utah Court pursuant to an agreement with her husband under which he fabricated the evidence by which she sustained her libel. After her death he was permitted to maintain his right as husband in her property notwithstanding the divorce.

This decision is not inconsistent with any position we have taken or need to take in the present case, since it cannot be contended, in the face of Mr. Justice Hammond's findings, that Andrews perpetrated any fraud upon the South Dakota Court. "His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted on the facts above stated." (Page 32, Record.)

It is to be noticed that while fraud is suggested in the New Jersey cases as a ground for collateral attack, the fraud referred to means fraud upon one of the parties to the suit. Collusion, unless it involves an agreement to commit perjury or some other illegal act, is not treated either there or in any other jurisdiction as a ground for attack, but rather a ground for estoppel.

THIRD.

Since the courts of each State are required to give to the judgments of other States the faith and credit which are given by law or usage to domestic judgments, it is pertinent to inquire whether any court would permit a domestic judgment to be impeached by one of the parties thereto in a case like the present.

It can be stated, we submit, as a universal proposition that the judgment of a court which has the power to enter judgment upon the facts alleged is binding upon the parties before it, and that this proposition is true of divorce judgments as of other judgments.

"If both parties colluded in a cheat upon the court it was never known that either of them could vacate the judgment."

Willes, C. J., in Prudam *v.* Phillips, Hargraves' Law Tracts, 456,

a case involving the validity of a judgment of nullity.

The above sentence was quoted with approval by Shaw, C. J., in

Greene *v.* Greene, 2 Gray, 361, 362,

and was reaffirmed by Mr. Justice Holmes in

Adams *v.* Adams, 154 Mass. 290, 297.

The effect of the decision in Greene *v.* Greene is thus stated in a later Massachusetts case: —

"Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated on the ground of fraud in its procurement in a separate and independent libel subsequently brought between the same parties when it appears that the first decree was entered after due notice to the divorced party followed by an adjudication upon the evidence offered in support of the allegations of the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases."

Edson *v.* Edson, 108 Mass. 590, 598.

Shaw, C. J., in Greene *v.* Greene, 2 Gray, 365, refers to the Duchess of Kingston's case, 20 Howell's State Trials, 355, as holding that a decree of nullity of marriage "in a court of competent jurisdiction was conclusive between the parties, but not so in a suit between other parties, and that on an indictment it was competent for the Crown to avoid the effect of the decree in question by proving that it was obtained by the collusion of both parties and a fraud upon the court."

The precise distinction made in the Duchess of Kingston's case between the right of the State and the right of the parties has been followed in Michigan and Minnesota. In both of these States it was held on an indictment for adultery that a divorce obtained in the State in which neither party resided, although the parties had submitted to the jurisdiction, was no defence.

People *v.* Dawell, 25 Mich. 247.
State *v.* Armington, 25 Minn. 29.

But in later cases these courts have held that a divorce obtained under the same circumstances was not open to attack by either party.

Waldo *v.* Waldo, 52 Mich. 94.
Ellis' Estate, 55 Minn. 401.

In Ellis' Estate, the wife having obtained a divorce from her husband, was held precluded from claiming rights as his widow. Her contention was that the divorce was void because neither party lived in the State where the divorce was granted.

Gilfillan, C. J. (p. 411), said: —

"In an action for divorce, the *res* upon which the judgment operates is the status of the parties. There are three parties interested in that, the husband, the wife and the State of their residence."

The Judge, after referring to People *v.* Dawell, 25 Mich. 247, and Waldo *v.* Waldo, 52 Mich. 94, continued: —

"We may from both cases take the rule to be that while the State cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of the Court in another State in an action of divorce, the parties may so bind themselves in respect to their individual interests."

In support of our general proposition that a party who assents to a divorce judgment is bound by it, we submit herewith a number of authorities. In most of the cases cited, the ground of attack was want of jurisdiction. In some, collusion and fraud upon the Court. In some cases the party making the attack was the original libellant, and in others the libellee, who either agreed to the divorce judgment at the time, or subsequently acquiesced in it by marrying or by permitting the libellant to marry without objection.

Cases in which a woman has renounced her status as wife, and has later tried to assert her status as widow, are not infrequent, but the unanimity with which the Court has discouraged this form of enterprise is impressive.

Nichols *v.* Nichols, 25 N. J. Eq. 60.

Wife seeking divorce attacks divorce obtained by husband on grounds of collusion and non-jurisdiction. Wife appeared. After divorce husband married again. Wife made no move for four years.

Zoellner *v.* Zoellner, 46 Mich. 511.

Plaintiff seeks to set aside husband's *ex parte* divorce after husband's death. Husband without objection from plaintiff had married again after divorce.

Richardson's Estate, 132 Pa. St. 292.

Plaintiff claiming widow's right attacks *ex parte* divorce obtained by her husband on jurisdictional grounds. After divorce both husband and wife had married.

Arthur *v.* Israel, 15 Col. 147.

Plaintiff claiming widow's right attacks *ex parte* divorce obtained by husband on jurisdictional grounds. After divorce plaintiff had married.

Mohler *v.* Shank, 93 Iowa, 273.

Plaintiff claiming widow's right attacks divorce obtained by husband on jurisdictional grounds. She had accepted alimony and married again.

Marvin *v.* Foster, 61 Minn. 154.

Husband's grantee seeking partition of deceased wife's lands attacks divorce obtained by wife on jurisdictional grounds. Husband on hearing of divorce had married again.

Stephens *v.* Stephens, 51 Ind. 542.

Plaintiff having married after judgment of divorce obtained by wife appeals from judgment.

Nicholson *v.* Nicholson, 113 Ind. 131.

Wife seeks to set aside divorce of husband on ground of fraud. She made no move until husband married again.

Davis *v.* Davis, 61 Me. 395.

Wife seeks statutory dower after divorce. Husband objects that divorce was obtained by collusion and fraud on the court.

Miltimore *v.* Miltimore, 40 Pa. St. 151.

Plaintiff claiming widow's right alleges that divorce obtained by her was collusive and fraudulent.

In the matter of Morrison, 52 Hun. 102. Affirmed 117 N. Y. 638.

Husband after obtaining *ex parte* divorce claimed rights in deceased wife's property.

Ellis *v.* White, 61 Iowa, 644.

Plaintiff claiming widow's right attacks divorce obtained by herself on jurisdictional grounds.

Elliott *v.* Wohlfrom, 55 Cal. 384.

Husband's grantee attacks *ex parte* divorce obtained by him on jurisdictional grounds.

In Nichols *v.* Nichols, 25 N. J. Eq. 60, the Court said: —

"In Singer *v.* Singer, 41 Barbour, 139, on motion to set aside a decree of divorce for collusion, the Court said where the judgment of divorce has been acquiesced in for a period of several years and the plaintiff has again been married, some better reason than the mere gratification of personal feeling or the desire to obtain a further sum of money from the plaintiff should be made clearly to appear before the Court would be warranted in granting such an application. The ground on which such an order would be made would be one of public policy, but no such reason should suffice where after the acquiescence of both the parties in a judgment for three years an innocent person has been involved by marriage and the opening of the judgment would involve her in distress and perhaps disgrace. This reason would alone be sufficient to justify me in denying the motion if there were no other reason for doing so, and leaving the parties to the consequences of their own acts and agreements after a long delay has taken place. Here is a long delay wholly unexplained. The object of this bill is obviously merely alimony. Public policy does not require the intervention of the Court between these parties. It rather forbids."

In the foregoing cases the original divorce judgment was attacked in some instances on jurisdictional grounds and in others on non-jurisdictional grounds of fraud and collusion, and where the parties have submitted to the jurisdiction of the court there is no valid ground of distinction between the two cases.

If there is any ground for holding that the parties to a divorce judgment are not bound by it, that must be because the State is interested to uphold the marriage relation even against the will of both parties. But if that is the true ground, then it is clear that it can make no difference whether the fraud practised upon the court is a jurisdictional fraud or some other kind of fraud. Suppose, for example, a resident of Massachusetts whose wife has deserted him for one year wishes to obtain a divorce. His wife is willing that he

should. He goes into court after proper service and swears that hi wife has deserted him for three years. His wife does not contes and the divorce is granted. Clearly the wife is bound by thi decree. If thereafter it were open to the wife to attack this divorc when some change in the fortunes of her husband made it he interest to do so, a large proportion of the uncontested divorce granted annually in Massachusetts and other States would be put i peril. Now, suppose that this same man, not being willing to l about the length of the desertion, went to South Dakota whe desertion for one year is a cause, and there told the truth about th desertion but lied about his residence. Upon what ground of publ policy shall it be held that the decree should be open to attack i the one case but not in the other?

No State court would allow a divorce decree of its own tribunal rendered in the presence of both parties, to be attacked upon th jurisdictional question or upon any other. If this be true we subm that the Constitution of the United States protects under the sam circumstances the decrees of other States.

FOURTH.

Recent Cases.

The recent cases decided by this Court in no way change the la as it heretofore existed, but are declaratory of the principles co tended for in this brief.

Bell *v.* Bell, Supreme Court Reporter, Vol. 21, 552.
Streitwolf *v.* Streitwolf, Supreme Court Reporter, Vol. 21, 55

In both these cases the decree of divorce sought to be set up w obtained in cases where there was no appearance by the responden and the proceedings were *ex parte*.

The case of Atherton *v.* Atherton, Supreme Court Reporter, Vo 21, 544, in no way applies to a case like the case at bar and in n way affects the principles contended for in this brief.

ANNIE ANDREWS,
Plaintiff in Error.

Charles W. Bartlett,
Elbridge R. Anderson,
of Counsel.

Office Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 119.

ANNIE ANDREWS, Plaintiff in Error,

vs.

KATE H. ANDREWS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

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Of Counsel.

Press of Byron S. Adams, Washington, D. C.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This action was begun ~~February~~ October 14, 1897, by the plaintiff in error, who, claiming to be the widow of Charles S. Andrews, filed on that date in the probate court for the county of Suffolk, in the Commonwealth of Massachusetts, a petition for letters of administration on the estate of the said Charles (p. 2).

The proceedings were *ex parte* and without notice, as was

the practice in that jurisdiction, and resulted in the passing of a decree the same date, appointing the petitioner administratrix as prayed (p. 3).

From this decree the defendant in error, Kate H. Andrews, on the 5th day of November, 1897, appealed to the supreme judicial court of the Commonwealth, the same "being the supreme court of probate for said Commonwealth" (p. 3); and for objection to such decree she averred that the statement of the petitioner, Annie, that she was the widow of said Charles was not true, "as the appellant, Kate H. Andrews, at the time of the death of said Charles S. Andrews was his only lawful wife and is now his widow" (p. 4).

The petitioner, Annie, duly appeared in the supreme judicial court, by her attorneys (p. 4), and answering the claim of the appellant, Kate H., denied "that said Kate is the widow of Charles S. Andrews," and averred "that she has no right in law to prosecute this appeal and this court has no jurisdiction to entertain, hear, or determine the same" (p. 5).

Thereupon a hearing was had before a single judge, and both parties introduced testimony to sustain their respective contentions. At the close of the evidence the appellee, Annie, asked the court to rule—

(1st.) That upon all the evidence in the cause the appellant (Kate H.) has no standing in this court, and is not a person interested in the estate of Charles S. Andrews, deceased.

(2d.) That upon all the evidence in the case the appellant by her own conduct has connived at and acquiesced in the

marriage of said Charles S. Andrews and the appellee, Annie Andrews, and on account of said connivance and acquiescence in said marriage she cannot now be permitted to be heard to impeach the validity of said marriage.

(3d.) That upon all the evidence in the case the appellant (Kate H.) by her conduct has connived at and acquiesced in the marriage of the said Charles S. Andrews and the said appellee, Annie Andrews, and without objection has allowed the said marriage relations to exist and children to be born of the said marriage, and she cannot now be heard to impeach the validity of said marriage by attacking the validity of the divorce procured in the circuit court of South Dakota by the said Charles S. Andrews against her (p. 31).

The court refused so to rule, and exceptions to such refusal were duly noted (p. 31), but it is conceded by the brief of the plaintiff in error filed in this court (pp. 3 and 4) that the 2d and 3d requests above do not raise any questions reviewable under the pending writ of error.

Thereupon the court made the following findings of fact:

"Charles S. Andrews being then about twenty-one years of age and domiciled in Boston and the appellant were married there April 13, 1887, and thereafter lived in Boston as husband and wife until the latter part of April, 1890, at which time the wife, claiming to have a justifiable cause therefor, left her husband and began a suit for separate maintenance, which was finally settled in December, 1890, in the manner disclosed by the evidence, in accordance with the agreement of November 18, 1890.

"A child, the only issue of this marriage, died in January, 1889. In the summer of 1891 the husband, being then and ever since his marriage domiciled in Boston, went to South

Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of that State to gain a domicile there, and on November 19, 1891, filed a petition for divorce in the proper court of that State. The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement, 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897.

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated. After the wife left her husband in 1890, she visited some time in New York, but had her home in Boston. In the fall of 1891 she leased her house in Boston for three years, and in November, 1891, went to stay with her parents in Washington, D. C., indefinitely, and since that time has remained a part of the time with her parents at Washington and a part of the time with her aunt in Newton in this State. I do not find that since her marriage her domicile has been changed, unless as a matter of law, it was changed to South Dakota when her husband went there. She has always since h[illegible] marriage intended that her home should be in this State, and considered it to be here.

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of

this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated.

"Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children still living.

"The petitioner at the time of the marriage believed that the said Charles had the right to marry. She had nothing whatever to do with the divorce, was in no way the alleged or actual cause of the disagreement between the said Charles and the appellant, and throughout has acted in the utmost good faith. She knew of the divorce, but believed it was legal, and had reason so to believe.

"The appellant knew of this second marriage soon after it occurred, and never took any steps to have it declared illegal, except that on July 23, 1897, she filed in this court a petition for separate maintenance against the said Charles, which was pending at the time of his death, and that she has appeared in this present case; and it does not appear that until after the death of the father of said Charles in June, 1897, she even claimed or believed the divorce illegal, or had any idea of making such a claim.

"I find, if the finding is warranted by the above facts, that the appellant connived at and acquiesced in the second marriage."

The foregoing (pp. 31–33) being all the findings of fact, the trial judge (Hon. John W. Hammond, J. S. J. C.) reiterated his refusal above noted to rule as requested by said appellee, Annie, and ruled as a conclusion of law from the above facts—

That "the divorce obtained in South Dakota, is by Public Statutes, c. 146, sec. 41, of no force or effect in this Common-

wealth; that the respondent (Kate H.) must be regarded as the lawful wife of the said Charles; that the second marriage (to Annie) was therefore illegal; and having so ruled" he ordered "the decree of the probate court to be reversed and the case remanded to said court" (p. 33).

To which refusal and rulings the appellee, Annie, duly excepted (p. 33), and a bill of exceptions was prepared, allowed, and filed on March 2, 1899 (pp. 5–33).

Thereupon, the matter having come on to be further heard on the bill of exceptions before a bench of five judges (Holmes, Ch. J.; Morton, Lathrop, Barker, and Hammond, JJ.), said exceptions were on the 16th day of May, 1900, overruled (p. 73), and by direction of said appellate tribunal were by its rescript so ordered to be noted of record by the clerk of the supreme judicial court for Suffolk county.

June 4, 1900, appearance of additional counsel for the appellee was entered by Jabez Fox, Esq., and on June 30, 1900, a final decree was entered in favor of Kate H. and against said Annie in the following terms:

"This case came on to be further heard, and now, on consideration thereof and in pursuance of a rescript from the supreme judicial court for the Commonwealth, as appears on record in this cause, it is ordered, adjudged, and decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth, and that his subsequent marriage with Annie Andrews, appellee, was therefore illegal; that said Kate H. Andrews is his lawful widow, and said Andrews is not entitled, as his widow, to administer his estate; that the decree of the probate court appointing her to be administratrix of his estate be reversed and her petition for administration be dismissed" (p. 74).

To review this decree the writ of error was sued out from this court, the plaintiff in error, by her attorney, Mr. Fox, assigning errors as follows:

First. The court, in ordering her petition for the administration of the estate of Charles S. Andrews to be dismissed on the ground that she was not the widow of said Andrews, failed to give full faith and credit, as required by the Constitution and laws of the United States, to the judicial proceedings had in the State of South Dakota, by which the said Andrews was divorced from the defendant in error, Kate H. Andrews.

Second. Section forty-one of chapter one hundred and forty-six of the Public Statutes of Massachusetts, as applied to this case, is repugnant to the Constitution and laws of the United States, and the court upheld said statute (p. 7).

ARGUMENT.

Want of Jurisdiction.

No Federal question is presented by this record for the consideration of this court. Possibly a Federal question might have been raised in the courts of Massachusetts which would have supported the writ of error from this court, but it does not appear that the courts of that Commonwealth were called upon to consider any Federal question, nor do they appear to have disposed of one. In fact, the existence in the case of a Federal question as such does not seem to have been suspected until after the exceptions to the rulings of the trial judge had been overruled by the

court in *banc*, and no suggestion of the existence of such a question appears to have been made on the record until after the entry of the final decree, which it is now sought to have reviewed. Under such circumstances, the writ of error should be dismissed.

Loeber *vs.* Schroeder, 149 U. S., 580.
Sayward *vs.* Denny, 158 U. S., 180.
Pim *vs.* St. Louis, 165 U. S., 273.
Oxley Stave Co. *vs.* Butler Co., 166 U. S., 695.
Chapin *vs.* Fry, 179 U. S., 129.

The mere fact that the State courts "decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth" does not of itself raise a Federal question necessitating the exercise of appellate powers by this court, for if it appears upon the face of the foreign decree or otherwise that the court of its origin was without jurisdiction to pronounce it, the so-called decree is in fact no decree, and consequently no constitutional question can arise thereabout.

Neither the decree of the supreme judicial court of the Commonwealth nor the Public Statutes (chap. 146, sec. 41) here complained of deny faith and credit to the decrees of divorce pronounced by the courts of South Dakota in general. On the contrary, the statute expressly declares that—

"A divorce decreed in another State or country according to the laws thereof, and by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth."

No more liberal recognition of or assent to the decrees of foreign courts is or could be required by the due faith and credit clause of the Federal Constitution.

But the supreme judicial court, when confronted with the so-called decree of the South Dakota court, found as a fact that that court, under a fair and reasonable interpretation of the laws of that State, had never acquired jurisdiction over the parties to the controversy such as would enable it to render an effective decree in the premises.

As was said in Bell *vs.* Bell, 181 U. S., 175, 177—

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing of the petition. * * * The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. Thompson *vs.* Whitman, 18 Wall., 457. The referee in this case has not only found generally that at the time of those proceedings the wife was a resident of the State of New York and the husband was not a *bona fide* resident of Pennsylvania, but has also found that on January 31, 1894, some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie county, in the State of New York, as a resident of that county; and that no evidence was offered that he actually changed his domicil from New York to Pennsylvania. Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicil in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or any other State," citing—

Leith *vs.* Leith, 39 New Hampshire, 20.
People *vs.* Dowell, 25 Michigan, 247.
Sewall *vs.* Sewall, 122 Massachusetts, 156.
Litowitch *vs.* Litowitch, 19 Kansas, 451.
Van Fossen *vs.* State, 37 Ohio State, 317.
Gregory *vs.* Gregory, 78 Maine, 187.
Dunham *vs.* Dunham, 162 Illinois, 589.
Thelen *vs.* Thelen, 75 Minnesota, 433.
Magowan *vs.* Magowan, 12 Dickinson (57 N. J. Eq.), 322.

And so, also, is Streitwolf *vs.* Streitwolf, 181 U. S., 179, 182, where it was said:

"This case must follow *Bell vs. Bell.* The law of North Dakota requires a domicil in good faith of the libellant for ninety days as a prerequisite to jurisdiction of a case of divorce. The facts in evidence warranted, and indeed required, the finding that the husband had no *bona fide* domicil in the State of North Dakota, when he obtained a divorce there, and it is not pretended that the wife had an independent domicil in North Dakota or was ever in that State. The court of that State, therefore, had no jurisdiction."

The recital of the jurisdictional facts in the record of the proceedings had in the circuit court of Minnehaha county, South Dakota, having been called in question, and it appearing that neither party to the divorce proceedings there had ever been domiciled or acquired a *bona fide* residence in that State, it was entirely competent for the Massachusetts courts to refuse recognition to the Dakota decree. It having been found that the Dakota court had at no time had jurisdiction of the parties to the proceedings before it, the refusal to accord faith and credit to such proceedings does not raise a Federal question, for such proceedings are as though they had never been, and a decree purporting to afford affirmative relief rendered in the course of such proceedings is in effect and, indeed, in fact, no decree. If it be in fact no decree, then the failure to accord to it faith and credit is not forbidden by the Constitution even by implication, for "faith and credit" is not required to be extended to a mere name; it is commanded but for such "proceedings" as have substance.

There is no conflict whatever over the proposition stated by Mr. Schuler, as follows:

"The courts of one State are not bound to recognize a judgment of divorce granted by the courts of another State, if, in fact, the parties were neither of them *bona fide* residents of the latter State at the time of the divorce suit; for to give the courts of any State jurisdiction over the marriage relation, one of the parties at least must have a genuine domicile within its territory, and not a mere residence for the purpose of the divorce. If the parties have neither of them a domicile in the State, a divorce which the courts of that State assume to grant is absolutely nugatory, and may be so treated in other States."

Schuler on "Husband and Wife," § 574.

And in Sewall *vs.* Sewall, 122 Mass., 156, Mr. Justice Gray, delivering the opinion of the court, said that:

"Where a husband goes into another State, without acquiring a domicile there, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in, but which was not a cause of divorce by the law of Massachusetts, a court of that State has no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction."

In the case of People *vs.* Dawell, 25 Mich., 247, the defendant was indicted and convicted of bigamy. He claimed as a defense a divorce obtained by his first wife on her application in the State of Indiana. It appeared that the first wife, in fact, lived in Michigan, although claiming a residence in Indiana, and that the husband appeared by attorney in the Indiana proceeding and admitted the wife's residence to be in Indiana. The Indiana divorce was held invalid. Judge Cooley said in his opinion:

"I understand the rule to be, that to give the courts of any State jurisdiction over the marriage relations between

a husband and his wife one of the parties at least must have a domicile within that State. Some of the judicial decisions make further requirements, but no court has ever held that any less could be demanded" (p. 254).

It does not follow, because a court has the statutory power to grant divorces, that faith and credit must necessarily be accorded to its decrees, for to enable such court to render a valid decree of divorce it must also happen that at least one of the parties to the proceedings was a domiciled citizen of the State from which the court derives its powers.

Hood *vs.* State, 56 Indiana, 263; 26 Am. Rep., 21.

Sewell *vs.* Sewell, 122 Massachusetts, 156; 23 Am. Rep., 299.

Referring to the provision of the Constitution that full faith and credit shall be given to the judicial proceedings of other States, Judge Cooley pertinently remarks:

"Its whole purpose and aim was in the direction of justice, comity, and good neighborhood between the States and it would be most remarkable if it could now be employed to bolster up a proceeding where a court of one State has interfered with a matter which wholly pertains to the concerns of another State, and relates to its citizens exclusively, which it is impertinent for such court in any manner to meddle with, and which justice, as well as every principle of comity, requires such court to let alone. If the constitutional provision can be so employed, then I do not hesitate to say, that it is capable of accomplishing more evils than it had power to prevent; and that, too, in the very direction in which its good influences were anticipated. For the effect is to destroy interstate comity and good neighborhood by enabling one State to extend its laws and legal procedure into the domains of its neighbors, to subject the citizens of such neighbor to its control in their most important relations of life, and to introduce among them practices which their own laws regard in a very high degree vicious and demoralizing."

The Massachusetts courts have uniformly refused to recognize the validity of divorces granted by other States where a party has gone into another State without acquiring a domicile there for the purpose of obtaining, and does obtain, a divorce for a cause which occurred in but which was not a cause of divorce by the law of Massachusetts, on the ground that the court of that State had no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction.

Sewall *vs.* Sewall, 122 Mass., 156.
Hanore *vs.* Turner, 14 Mass., 227.
Chase *vs.* Chase, 6 Gray, 157.
Lyon *vs.* Lyon, 2 Gray, 368.

The real matter of moment which the courts of Massachusetts were called upon to decide in this cause was of purely local concern.

It involved, as between two citizens of that Commonwealth, the disputed right under local laws to administer the estate of a deceased citizen who had died as he had lived, within the shadow of her State-house, and whose earthly possessions subject to such administration lay within her borders.

To decide the question of disputed right the State courts were called upon to ascertain and declare the marital status of certain of the State's own citizens who had gone through the marriage ceremony within the State according to its customs, had resided together therein as husband and wife, and none of whom up to the time of the death of the husband had acquired a domicile elsewhere.

The marriage of Charles S. and Kate H. took place at Boston, April 13, 1887, and they thereafter lived in Boston as husband and wife until the latter part of April, 1890, at which time the wife, claiming to have justifiable cause therefor, left her husband and began a suit for separate maintenance, which was finally settled in December, 1890, by agreement of the parties, and the petition was dismissed (p. 63).

> "In the summer of 1891 the husband being then and ever since his marriage domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here (Boston) while the parties resided here and which would not authorize a divorce by the laws of this Commonwealth," and thereafterwards a decree granting such divorce was passed and "within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897" (p. 32).
>
> "The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above noted. After the wife left her husband in 1890 she visited some time in New York, but had her home in Boston. * * * I do not find that since her marriage her domicile has been changed, unless, as a matter of law, it was changed to South Dakota when her husband went there. She has always since her marriage intended that her home should be in this State, and considered it to be here.

"I find that the husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished." * * * "Upon his return to this State he soon met the petitioner (Annie), and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death."

It is now well settled that each State has the right to regulate the *status* of its own citizens, but it has no jurisdiction to change or determine the *status* of citizens of a foreign State.

"It is obvious," said Chief Justice Ames in Ditson *vs.* Ditson, 4 Rhode Island, 87 (cited in Atherton *vs.* Atherton, 18 U.S. 183 supra), "that marriage as a domestic relation emerged from the contract which created it, gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its owns citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister States; that a State cannot be deprived directly or indirectly of its sovereign power to regulate the status of its own domiciled subjects, and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that status."

Each State, therefore, acting with respect to its own domiciled citizens and not called upon by reason of relation or interest to pass on the rights of citizens of any other State, is

the sole judge of the marital status of such citizens, and it alone has exclusive right to say upon what grounds or for what causes such status may be dissolved or modified.

Every State makes its law for and has the right to control the domestic status of those who make their home in it.

Cook *vs.* Cook, 56 Wisconsin, 195.
Hunt *vs.* Hunt, 72 N. Y., 217.

And so it would seem that the State of Massachusetts contravened no Federal right when, by section 41 of chapter 146 of its Public Statutes, it expressly declared that—

"when an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth;"

nor did the application of the provisions of such statute to the facts found in this cause raise such a Federal question as will support the writ of error from this court, for the State in enacting the law and the State courts in applying it were but dealing with the marital status of citizens or subjects of the Commonwealth of Massachusetts, as to which the Commonwealth, acting through its legislature or its courts, has the sole right of regulation and judgment. Of this right it cannot be deprived, either directly or indirectly.

In declining to be bound by a void decree of divorce of a court which had no jurisdiction of the marital status of either party to the marriage, and in adjudging the right to administer a local estate as between the contending claimants therefor, both of such claimants being its own domi-

iled citizens, the State courts but determined a purely local question, which was sufficiently broad to support the judgment here complained of, and no Federal question was necessarily involved in the result reached. It would seem that the writ of error should consequently be dismissed.

MERITS.

If it should be determined that this court has jurisdiction to review the judgment of the supreme judicial court of the Commonwealth, then upon the facts as disclosed by the record that judgment must be affirmed.

By section 2558 of the Compiled Laws of South Dakota, Civil Code, it is provided that marriage may be dissolved only—

"1. By the death of one of the parties.

"2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

"SECTION 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the Territory (State) ninety days next preceding the commencement of the action."

It is plain that a court may have jurisdiction to try a divorce case without having power to grant a valid decree of divorce to the applicant, even though he may allege and prove a cause for divorce under the laws of the State where relief is sought; for example, if the applicant be not in fact domiciled within the territorial jurisdiction of the court.

Bishop, Marriage, Divorce, and Separation, sec. 51.

The tribunals of a country have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither

of the parties has within its territory an actual *bona fide* domicil. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction.

Bishop, Marriage and Divorce, 6th ed., sec. 144.

Though the words "domicil" and "residence" are not synonymous, a statute requiring a specified number of years residence in a State to give the courts jurisdiction of an application for divorce is to be interpreted as requiring domicil.

Ibid., sec. 124.

Our divorce statutes giving jurisdiction commonly provide that the applicant shall have "resided" a given number of years in the State. The principles of international law and the general principles of our own requiring the residence for divorce to be *animo menendi*, such residence must at least partake of the character of permanency.

Whitcomb *vs.* Whitcomb, 46 Iowa, 437.

Hanson *vs.* Hanson, 111 Mass., 158.

"If a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or county jurisdiction over the marriage relations, and any decree they may assume to make would be void as to the other party."

Cooley, Constitutional Limitations, p. 401.

Citing:

Hanover *vs.* Turner, 14 Mass., 227.
Greenlaw *vs.* Greenlaw, 12 N. H., 200.
Kimball *vs.* Kimball, 13 N. H., 225.
Bachelder *vs.* Bachelder, 14 N. H., 380.
Payson *vs.* Payson, 34 N. H., 518.
Hopkins *vs.* Hopkins, 35 N. H., 474.

In an action by the husband for his interest in the deceased wife's lands it appeared that the wife had gone to Nebraska temporarily to obtain a divorce. The law of Nebraska required as a condition precedent six months' residence. The wife remained within the State the requisite length of time. *Held*, that the Nebraska court had not acquired jurisdiction, and its decree of divorce in the case might be collaterally assailed.

Neff *vs.* Beauchamp, 74 Iowa, ~~985~~ 95

Residence in good faith includes the attributes of domicil.

Carpenter *vs.* Carpenter, 30 Kansas, 712.

It presupposes the intention of remaining in the place permanently.

Smith *vs.* Smith, 7 North Dakota, 412.

The application of this view to the case at bar is expressed in the opinion of the court (pp. 75, 76), as follows:

"Charles S. Andrews went to South Dakota for the purpose of getting the divorce, and intended to return to Massachusetts as soon as he had done so. Subject to this intention, it is found that he intended to become a resident of South Dakota for the purpose of getting a divorce, and to do all that was needful to make him such a resident.

"The statute of South Dakota forbids a divorce, 'unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action.' * * * the language of the South Dakota statute must be taken to require not merely bodily presence, but domicil. In the light of the decisions upon similar acts, and the generally accepted rule making domicil the foundation, the words 'resident of the Territory' mean domi-

ciled in the Territory, whether they also mean personally present or not," citing

Graham *vs.* Graham, 81 N. W. Rep., 44.
Dickinson *vs.* Dickinson, 167 Mass., 474, 475.
Reed *vs.* Reed, 52 Mich., 117, 122.
Leith *vs.* Leith, 39 New Hampshire, 20, 41.
Van Fossen *vs.* State, 37 Ohio St., 317, 319.

"The finding of the single justice clearly means that the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts."

The facts in evidence warranted, and indeed required, the finding that Charles S. Andrews did not have a *bona fide* residence or domicil in the State of South Dakota when he obtained the decree of divorce there, and also the further finding that his wife, Kate H., had never been in that State.

Upon the authority of Bell *vs.* Bell and Streitwolf *vs.* Streitwolf, *ubi supra*, it is plain that the decree of the supreme judicial court must be affirmed unless the further facts found by that court, viz., that said Kate H., having notice of the pendency of the proceedings in the South Dakota court, appeared therein by counsel, filed an answer denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, and subsequently "for the purpose of carrying out her agreement, 'to consent to the granting of a divorce for desertion in South Dakota,' requested her counsel there to withdraw her appearance in that suit, which they did," and afterwards, without further objection on her part, the decree now attacked was passed, are material and necessitate a different result.

It is evident that these additional facts cannot affect the sult unless it be conceded that connivance or consent can rve to render a decree otherwise void for want of jurisdic-n in the tribunal pronouncing it valid.

However this might be in ordinary suits *in personam*, in vorce proceedings consent cannot vitalize an otherwise id decree, for the courts of a State where neither party is miciled are without jurisdiction in law to render a valid cree of divorce, and as such suits are not merely suits be-reen the husband and wife, but affect a public institution, eir consent cannot confer jurisdiction, so that where a di-orce is granted in a State where neither party is domiciled, t in a proceeding in which both have appeared, their mar-ed status is not affected.

Harrison *vs.* Harrison, 20 Alabama, 629.
McGuire *vs.* McGuire, 7 Dana (Ky.), 181.
People *vs.* Dowell, 25 Michigan, 247.
Van Fossen *vs.* State, 37 Ohio St., 317.
Whitcomb *vs.* Whitcomb, 46 Iowa, 437.
Litowitch *vs.* Litowitch, 19 Kansas, 451.
Chase *vs.* Chase, 6 Gray, 157.
Sewall *vs.* Sewall, 122 Massachusetts, 156.
Leith *vs.* Leith, 39 New Hampshire, 20.
Platt *vs.* Platt, 80 Penna. St., 501.
Hare *vs.* Hare, 10 Texas, 355.
Jackson *vs.* Jackson, 1 Johns, 424.

"Divorce is allowed only for causes approved by law. Therefore the parties cannot dissolve their own marriage, or validly agree to a suspension of the cohabitation under it. Nor, for the same reason, can the courts do either simply from their consent. So that when an attempt is made

through the tribunals to accomplish this object, the public becomes in effect a party to the proceeding, not to oppose the divorce at all events, but to prevent the sentence passing except as justified by facts which the law has declared to be sufficient; 'for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair;' hence a divorce suit, while on its face a mere controversy between private parties of record, is, as truly viewed, a triangular proceeding *sui generis*, wherein the public, or government, occupies in effect the position of a third party."

Bishop, Marriage and Divorce, 6th ed., secs. 229*b*, 230.

This view has already been sealed with the approval of this court, and the doctrine contended for was expounded at length in Maynard *vs.* Hill, 125 U. S., 190, 210, where, speaking through Mr. Justice Field, it was said:

"It is also to be observed that, whilst marriage is often termed by text-writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the supreme court of Maine in Adams *vs.* Palmer, 51 Maine, 481, 483. Said that court, speaking by Chief Justice Appleton:

"'When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of

which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.' And again: 'It is not, then, a contract, within the meaning of the clause of the Constitution, which prohibits the impairing of the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress,' pp. 484, 485. And the Chief Justice cites in support of this view the case of Maguire *vs.* Maguire, 7 Dana, 181, 183, and Ditson *vs.* Ditson, 4 R. I., 87, 101. In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the State, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that *marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness, though formed by a contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than

any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

See also Chase *vs.* Chase, 6 Gray, 157, 161, where it is said:

"Nor would such a divorce (where neither party was domiciled within the State) be made good by the appearance of the respondent. The express provision of the statute, declaring that such divorce shall be of no force or effect in this State, is not made for the benefit of a party which may be waived by an appearance or otherwise; but, it is made upon high considerations of general public policy and public interest, the provisions of which cannot be waived. Appearance is evidence only of consent, and express consent would be of no avail."

Upon the whole case, then, it is submitted:

1st. That the writ of error should be dismissed for want of jurisdiction; or

2d. The judgment should be affirmed because it is clearly right.

FRANK DEWEY ALLEN,
FREDERIC D. MCKENNEY,
Attorneys for Defendant in Error.

WAYNE MACVEAGH,
Of Counsel.

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Supreme Court of the United States.

No. 23.—October Term, 1902.

Annie Andrews, Plaintiff in Error, vs. Kate H. Andrews. } In error to the Supreme Judicial Court of the State of Massachusetts.

[January 19, 1903.]

The plaintiff and the defendant in error, each claiming to be the lawful widow of Charles S. Andrews, petitioned to be appointed administratrix of his estate. The facts were found as follows:

Charles S. and Kate H. Andrews married in Boston in April, 1887, and they lived together at their matrimonial domicil in the State of Massachusetts. In April, 1890, the wife began a suit for separate maintenance, which was dismissed in December, 1890, because of a settlement between the parties, adjusting their property relations.

In the summer of 1891, Charles S. Andrews, to quote from the findings, "being then a citizen of Massachusetts and domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of said State to gain a domicil there, and on November 19, 1891, filed a petition for divorce in the proper court of that State."

Concerning the conduct of Charles S. Andrews and his purpose to obtain a divorce in South Dakota, whilst retaining his domicil in Massachusetts, the facts were found as follows:

"The husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a State election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated."

And further, that—

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated."

With reference to the divorce proceedings in South Dakota it was found as follows:

"The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897."

By the agreement of April 22, 1892, to which reference is made in the finding just quoted, it was stipulated that a payment of a sum of money should be made by Charles S. Andrews to his wife, and she authorized her attorney on the receipt of the money to execute certain papers, and it was then provided as follows:

"Fourth. Upon the execution of such papers M. F. Dickinson, Jr., is authorized in my name to consent to the granting of divorce for desertion in the South Dakota court."

Respecting the claim of Annie Andrews to be the wife of Charles S. Andrews, it was found as follows:

"Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children, still living."

It was additionally found that Annie Andrews married Charles S. Andrews in good faith and in ignorance of any illegality in the South Dakota divorce, and that Kate H. Andrews, as far as she had the power to do so, had connived at and acquiesced in the South Dakota divorce, had preferred no claim thereafter to be the wife of Charles S. Andrews until his death when in this case she asserted her right to administer his estate as his lawful widow.

From the evidence above stated the ultimate facts were found to be that Andrews had always retained his domicil in Massachusetts, had gone to Dakota for the purpose of obtaining a divorce, in fraud of the laws of Massachusetts, and with the intention of returning to that State when the divorce was procured, and hence that he had never acquired a *bona fide* domicil in South Dakota. Applying a statute of the State of Massachusetts forbidding the enforcement in that State of a divorce obtained

nder the circumstances stated, it was decided that the decree rendered n South Dakota was void in the State of Massachusetts, and hence that Kate H. Andrews was the widow of Charles S. Andrews and entitled to dminister his estate. (176 Mass. 92.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. *Penn Mutual Life Insurance Company* v. *Austin*, (1897) 168 U. S. 685. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case.

The statute of the State of Massachusetts, in virtue of which the court refused to give effect to the judgment of divorce, is as follows:

"SEC. 35. A divorce decreed in another State or country according to the laws thereof, by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth." (2 Comp. Laws Mass. 1902, ch. 152, p. 1357; Pub. St. c. 146, § 41.)

It is clear that this statute, as a general rule, directs the courts of Massachusetts to give effect to decrees of divorce rendered in another State or country by a court having jurisdiction. It is equally clear that the statute prohibits an inhabitant of Massachusetts from going into another State to obtain a divorce, for a cause which occurred in Massachusetts whilst the parties were domiciled there, or for a cause which would not have authorized a divorce by the law of Massachusetts, and that the statute forbids the courts of Massachusetts from giving effect to a judgment of divorce obtained in violation of these prohibitions. That the statute establishes a rule of public policy is undeniable. Did the court fail to give effect to Federal rights when it applied the provisions of the statute to this case, and, therefore, refused to enforce the South Dakota decree? In other words, the question for decision is, does the statute conflict with the Constitution of the United States? In coming to the solution of this question

it is essential, we repeat, to bear always in mind that the prohibitions of the statute are directed solely to citizens of Massachusetts domiciled therein, and that it only forbids the enforcement in Massachusetts of a divorce obtained in another State by a citizen of Massachusetts who, in fraud of the laws of the State of Massachusetts, whilst retaining his domicil, goes into another State for the purpose of there procuring a decree of divorce.

We shall test the constitutionality of the statute, first by a consideration of the nature of the contract of marriage and the authority which government possesses over the subject; and, secondly, by the application of the principles thus to be developed to the case in hand.

1. That marriage, viewed solely as a civil relation, possesses elements of contract is obvious. But it is also elementary that marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and that it may not, when once entered into, be dissolved by the mere consent of the parties. It would be superfluous to cite the many authorities establishing these truisms, and we therefore are content to excerpt a statement of the doctrine on the subject contained in the opinion of this court delivered by Mr. Justice Field, in *Maynard* v. *Hill*, (1888) 125 U. S. 190:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." (p. 205.)

* * * * * *

"It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is, of course, essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." (Ib. p. 210.)

It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject

erently domestic in its nature and upon which the existence of civilized iety depends. True, it is asserted that the result just above indicated l not necessarily flow from the conclusion that the statute is repugnant the Constitution of the United States. The decision that the Constitu- n compels the State of Massachusetts to give effect to the decree of orce rendered in South Dakota cannot, it is insisted, in the nature of ngs be an abridgment of the authority of the State of Massachusetts er a subject within its legislative power, since such ruling would only ect the enforcement of a decree rendered in another State and therefore thout the territory of Massachusetts. In reason it cannot, it is argued, held to the contrary without disregarding the distinction between acts ich are done within and those which are performed without the terri- ry of a particular State. But this disregards the fact that the prohi- tions of the statute, so far as necessary to be considered for the purposes this case, are directed, not against the enforcement of divorces obtained other States as to persons domiciled in such States, but against the ecution in Massachusetts of decrees of divorce obtained in other States persons who are domiciled in Massachusetts and who go into such her States with the purpose of practicing a fraud upon the laws of the tate of their domicil; that is, to procure a divorce without obtaining a *ona fide* domicil in such other State. This being the scope of the statute, is evident, as we shall hereafter have occasion to show, that the argu- ent, whilst apparently conceding the power of the State to regulate the issolution of marriage among its own citizens, yet, in substance, neces- arily denies the possession of such power by the State. But, it is further rgued, as the Constitution of the United States is the paramount law, and s, by that instrument, the State of Massachusetts is compelled to give ffect to the decree, it follows that the Constitution of the United States nust prevail, whatever may be the result of enforcing it.

Before coming to consider the clause of the Constitution of the United States upon which the proposition is rested, let us more precisely weigh the consequences which must come from upholding the contention, not only as it may abridge the authority of the State of Massachusetts, but as it may concern the powers of government existing under the Constitution, whether State or Federal.

It cannot be doubted that if a State may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce in fraud of the laws of the domicil, that the existence of all efficacious power on the subject of divorce will be at an end. This must follow if it be conceded that one who is domiciled in a State may whenever he chooses go into another State and, without

acquiring a *bona fide* domicil therein, obtain a divorce, and then compel the State of the domicil to give full effect to the divorce thus fraudulently procured. Of course, the destruction of all substantial legislative power over the subject of the dissolution of the marriage tie which would result would be equally applicable to every State in the Union. Now, as it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution, the result would be that the Constitution of the United States has not only deprived the States of power on the subject, but whilst doing so has delegated no authority in the premises to the government of the United States It would thus come to pass that the governments, State and Federal, are bereft by the operation of the Constitution of the United States of a power which must belong to and somewhere reside in every civilized government. This would be but to declare that, in a necessary aspect, government had been destroyed by the adoption of the Constitution. And such result would be reached by holding that a power of local government vested in the States when the Constitution was adopted had been lost to the States, though not delegated to the Federal government, because each State was endowed as a consequence of the adoption of the Constitution with the means of destroying the authority with respect to the dissolution of the marriage tie as to every other State, whilst having no right to save its own power in the premises from annihilation.

But let us consider the particular clause of the Constitution of the United States which is relied upon, in order to ascertain whether such an abnormal and disastrous result can possibly arise from its correct application.

The provision of the Constitution of the United States in question is section 1 of article IV, providing that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." The argument is that, even although the Massachusetts statute but announces a rule of public policy, in a matter purely local, nevertheless it violates this clause of the Constitution. The decree of the court of another State, it is insisted, and not the relation of the parties to the State of Massachusetts and their subjection to its lawful authority, is what the Constitution of the United States considers in requiring the State of Massachusetts to give due faith and credit to the judicial proceedings of the courts of other States. This proposition, however, must rest on the assumption that the Constitution has destroyed those rights of local self-government which it was its purpose to preserve. It, moreover, presupposes that the determination of what powers are reserved and what delegated by the Constitution is to be ascertained by a blind adherence to mere form in disregard of the substance of things. But the settled rule is directly to the contrary. Reasoning from analogy, the unsoundness of the proposition

emonstrated. Thus, in enforcing the clause of the Constitution for-
ling a State from impairing the obligations of a contract, it is settled
the decisions of this court, although a State, for adequate consider-
n, may have executed a contract sanctioning the carrying on of a
ery for a stated term, no contract protected from impairment under
Constitution results, because, disregarding the mere form and looking
ubstance, a State may not, by the application of the contract clause of
Constitution, be shorn of an ever inherent authority to preserve the
blic morals by suppressing lotteries. (*Stone* v. *Mississippi*, 101 U. S.
4; *Douglas* v. *Kentucky*, 168 U. S. 488.) In other words, the doctrine
that although a particular provision of the Constitution may seemingly
applicable, its controlling effect is limited by the essential nature of
e powers of government reserved to the States when the Constitution
s adopted. In view of the rule thus applied to the contract clause of
e Constitution, we could not maintain the claim now made as to the
fect of the due faith and credit clause, without saying that the States
ust, in the nature of things, always possess the power to legislate for the
eservation of the morals of society, but that they need not have the con-
nued authority to save society from destruction.

Resort to reasoning by analogy, however, is not required, since the prin-
ple which has been applied to the contract clause has been likewise
nforced as to the due faith and credit clause.

In *Thompson* v. *Whitman*, (1874) 18 Wall. 457, the action in the court
elow was trespass for the conversion of a sloop, her tackle, furniture, &c.,
pon a seizure for an alleged violation of a statute of the State of New
Jersey. By special plea in bar the defendant set up that the seizure was
nade within the limits of a named county, in the State of New Jersey, and
by answer to this plea the plaintiff took issue as to the place of seizure, thus
challenging the jurisdiction of the justices who had tried the information
and decreed the forfeiture and sale of the property. The precise point
involved in the case, as presented in this court, was whether or not error had
been committed by the trial court in receiving evidence to contradict the
record of the New Jersey judgment as to jurisdictional facts asserted
therein, and especially as to facts stated to have been passed upon by the
court which had rendered the judgment. It was contended that to permit
the jurisdictional facts, which were foreclosed by the judgment, to be re-
examined would be a violation of the due faith and credit clause of the
Constitution. This court, however, decided to the contrary, saying:

"We think it clear that the jurisdiction of the court by which a judg-
ment is rendered in any State may be questioned in a collateral proceed-
ing in another State, notwithstanding the provisiou of the fourth article of
the Constitution and the law of 1790, and notwithstanding the averments
contained in the record of the judgment itself."

The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for the court, in *Rose* v. *Himely*, (4 Cranch, 269,) where it was said:

"Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without its jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

And the same principle, in a different aspect, was applied in *Wisconsin* v. *Pelican Insurance Co.*, (1888) 127 U. S. 215. In that case the State of Wisconsin had obtained a money judgment in its own courts against the Pelican Insurance Company, a Louisiana corporation. Availing itself of the original jurisdiction of this court, the State of Wisconsin brought in this court an action of debt upon the judgment in question. The answer of the defendant was to the effect that the judgment was not entitled to extra-territorial enforcement, because the claim upon which it was based was a penalty imposed upon the corporation for an alleged violation of the insurance laws of the State of Wisconsin. The answer having been demurred to, it was, of course, conceded that the claim which was merged in the judgment was such a penalty. This court, having concluded that ordinarily a penalty imposed by the laws of one State could have no extra-territorial operation, came then to consider whether, under the due faith and credit clause of the Constitution of the United States, a judgment rendered upon a penal statute was entitled to recognition outside of the State in which it had been rendered, because the character of the cause of action had been merged in the judgment as such. In declining to enforce the Wisconsin judgment and in deciding that, notwithstanding the judgment and the due faith and credit clause of the Constitution, the power existed to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another State, the court, speaking through Mr. Justice Gray, said (p. 291):

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they

were rendered. (Const. art. 4, sec. 1; Act May 26, 1790, chap. 11, 1 Stat. at L. 122; Rev. Stat. § 905.)

"Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. (*Hanley* v. *Donoghue*, 116 U. S. 1, 4.)

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, 'The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' (Story, Confl. L. § 609; *Thompson* v. *Whitman*, 18 Wall. 457, 462, 463.)

"A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it into another State the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State it must be made a judgment there, and can only be executed in the latter as its laws may permit.' (*McElmoyle* v. *Cohen*, 13 Pet. 312, 325.)

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

2. When the principles which we have above demonstrated by reason and authority are applied to the question in hand, its solution is free from difficulty. As the State of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State, and there, without acquiring a *bona fide* domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Con-

stitution of the United States did not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. (*Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179.) In each of these cases it was sought in one State to enforce a decree of divorce rendered in another State, and the authority of the due faith and credit clause of the Constitution was invoked for that purpose. It having been established in each case that at the time the divorce proceedings were commenced, the plaintiff in the proceedings had no *bona fide* domicil within the State where the decree of divorce was rendered, it was held, applying the principle announced in *Thompson* v. *Whitman*, *supra*, that the question of jurisdiction was open for consideration, and that as in any event domicil was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside of the State in which it had been rendered. A like rule, by inverse reasoning, was also applied in the case of *Atherton* v. *Atherton*, (181 U. S. 155.) There a decree of divorce was rendered in Kentucky in favor of a husband who had commenced proceedings in Kentucky against his wife, then a resident of the State of New York. The courts of the latter State having in substance refused to give effect to the Kentucky divorce, the question whether such refusal constituted a violation of the due faith and credit clause of the Constitution was brought to this court for decision. It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil, and, therefore, that the courts of Kentucky had jurisdiction over the subject matter, it was held that the due faith and credit clause of the Constitution of the United States imposed upon the courts of New York the duty of giving effect to the decree of divorce which had been rendered in Kentucky.

But it is said that the decrees of divorce which were under consideration in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* were rendered in *ex parte* proceedings, the defendants having been summoned by substituted service, and making no appearance; hence, the case now under consideration is taken out of the rule announced in those cases, since here the defendant appeared and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered. But this disregards the fact that the rulings in the cases referred to were predicated upon the proposition that jurisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce. This becomes apparent when it is considered that the cases referred to were directly rested upon the authority of *Thompson* v. *Whitman*, *supra*, where the jurisdiction was assailed, not because there was no

power in the court to operate, by *ex parte* proceedings, on the *res*, if jurisdiction existed, but solely because the *res* was not at the time of its seizure within the territorial sway of the court, and hence was not a subject matter over which the court could exercise jurisdiction by *ex parte* or other proceedings. And this view is emphasized by a consideration of the ruling in *Wisconsin* v. *Pelican Insurance Company, supra*, where the judgment was one *inter partes*, and yet it was held that, in so far as the extra-territorial effect of the judgment was concerned, the jurisdiction over the subject matter of the State and its courts was open to inquiry, and if jurisdiction did not exist the enforcement of the judgment was not compelled by reason of the due faith and credit clause of the Constitution.

Indeed, the argument by which it is sought to take this case out of the rule laid down in the cases just referred to and which was applied to decrees of divorce in the Bell and Streitwolf cases practically invokes the overruling of those cases, and in effect, also, the overthrow of the decision in the Atherton case, since, in reason, it but insists that the rule announced in those cases should not be applied merely because of a distinction without a difference.

This is demonstrated as to *Thompson* v. *Whitman* and *Wisconsin* v. *Pelican Insurance Co.*, by the considerations already adverted to. It becomes clear, also, that such is the result of the argument as to *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*, when it is considered that in both those cases it was conceded, *arguendo*, that the power to decree the divorce in *ex parte* proceedings by substituted service would have obtained if there had been *bona fide* domicil. The rulings made in the case referred to hence rested not at all upon the fact that the proceedings were *ex parte*, but on the premise that there being no domicil there could be no jurisdiction. True it is, that in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* the question was reserved whether jurisdiction to render a divorce having extra-territorial effect could be acquired by a mere domicil in the State of the party plaintiff, where there had been no matrimonial domicil in such State—a question also reserved here. But the fact that this question was reserved does not affect the issue now involved, since those cases proceeded, as does this, upon the hypothesis conceded, *arguendo*, that if there had been domicil there would have been jurisdiction, whether the proceedings were *ex parte* or not, and therefore the ruling on both cases was that at least domicil was in any event the inherent element upon which the jurisdiction must rest, whether the proceedings were *ex parte* or *inter partes*. And these conclusions are rendered certain when the decision in *Atherton* v. *Atherton* is taken into view, for there, although the proceeding was *ex parte*, as it was found that *bona fide* domicil, both personal and matrimonial, existed in Kentucky, jurisdiction over the subject matter was held to

obtain, and the duty to enforce the decree of divorce was consequently declared. Nor is there force in the suggestion that because in the case before us the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the appearance of the parties and not on its jurisdiction over the subject matter—that is, *bona fide* domicil, irrespective of the appearance of the parties. Here again the argument, if sustained, would involve the overruling of *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*. As in each of the cases jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of *bona fide* domicil was a ruling that in its absence there could be no jurisdiction over the subject matter irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: that marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

Although it is not essential to the question before us, which calls upon us only to determine whether the decree of divorce rendered in South Dakota was entitled to extra-territorial effect, we observe, in passing, that the statute of South Dakota made domicil, and not mere residence, the basis of divorce proceedings in that State. As without reference to the statute of South Dakota and in any event domicil in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect, and as the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter where it was wanting because of the absence of domicil within the State, we conclude that no violation of

the due faith and credit clause of the Constitution of the United States arose from the action of the Supreme Judicial Court of Massachusetts in obeying the command of the State statute and refusing to give effect to the decree of divorce in question.

Affirmed.

Mr. Justice BREWER Mr. Justice SHIRAS and Mr. Justice PECKHAM dissent.

Mr. Justice HOLMES, not being a member of the court when the case was argued, takes no part.

True copy.

Test:

Clerk Supreme Court, U. S.